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J. A. LAVERY MOTOR COMPANY, a
corporation,

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APPEAL FROM

Appellee,

CIRCUIT COURT

v.

J. H. WEIL, MRS. J. H. WEIL, and
DUDLEY A. SHELTON,

COOK COUNTY.

Appellants.

311 L.A. 241

JUSTICE HERBEL DELIVERED THE OPINION OF THE COURT:

From the statement of defendants as to the form of action, it appears that the several defendants appealed from a judgment entered against them in an action originally brought by Alvin O. French and J. A. Lavery Motor Company, a corporation, against J. H. Weil, Mrs. J. H. Weil and Dudley A. Shelton to recover damages for personal injuries and property damage. By an amended complaint, it proceeded to trial, with J. A. Lavery Motor Company as the sole plaintiff, to recover for moneys paid to its employee, Alvin O. French, for injuries and for damages to its automobile which French was driving, incurred in a street intersection accident on April 10, 1939, at 75th Street and Blackstone Avenue in the City of Chicago, when the automobile driven by French collided with an automobile driven by the defendant, Dudley A. Shelton.

At the time of the accident complained of both the plaintiff, J. A. Lavery Motor Company, and its employee, French, and the defendants, Mr. and Mrs. Weil and their employee, Shelton, were operating under and were bound by the terms of the Workmen's Compensation Act of Illinois, and this action was brought under section 29 of that Act.

The case was heard by the court without a jury. Requests for finding for the defendants were made at the conclusion of plaintiff's case and at the conclusion of all the evidence. These requests were denied and the court found for the plaintiff in the

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311 A. 241

WILLIAM WATSON COMPANY
DIRECTOR
GOOD CREDIT

WILLIAM WATSON COMPANY
DIRECTOR
GOOD CREDIT

from the statement of defendants as to the facts of action, it appears that the several defendants appeared from a judgment entered against them in an action originally brought by William W. French and J. A. Lavery Motor Company, a corporation, against J. A. Lavery, Mrs. J. A. Lavery and Dudley A. Weston, to recover damages for personal injuries and property damage, by an amended complaint, and proceeded to trial, with J. A. Lavery Motor Company as the plaintiff, to recover for money paid to its employees, William French, for injuries and for damages to its automobile which French was driving, incurred in a street intersection accident on the 10th of 1936, at 70th Street and MacArthur Avenue in the City of Chicago, when the automobile driven by French collided with an automobile driven by the defendant, Dudley A. Weston.

At the time of the accident complained of both the plaintiff J. A. Lavery Motor Company, and its employees, French, and the defendants, Mr. and Mrs. Lavery and their employee, Weston, were existing under and were bound by the terms of the contract of insurance of the plaintiff, and this action was brought under section 13 of that act.

The case was heard by the court without a jury. Evidence for and against the defendants was made at the conclusion of the plaintiff's case and at the conclusion of all the evidence. There were no verdicts and the court found for the plaintiff in the

sum of \$1954.59 and costs on its amended complaint, which charged the defendants with negligence and with wilful, wanton and malicious conduct. Defendants' motion for a new trial and motion for judgment notwithstanding the verdict was denied, and the court having entered judgment upon the finding, this appeal was taken by defendants.

There is no point raised on the pleadings except that plaintiff charged that the defendants: (1) carelessly, negligently and improperly operated an automobile, (a) at a high and unlawful rate of speed, (b) without keeping a proper lookout, (c) without giving suitable and reasonable warning of its approach, (d) without stopping said automobile before striking plaintiff's automobile, (e) with inefficient and ineffective brakes, and (f) without yielding the right of way; and that the defendants (2) willfully, wantonly and maliciously drove said automobile; and that they (3) willfully, wantonly and maliciously drove said automobile at a high and unlawful rate of speed. The defendants' answer denied that plaintiff and its agent, French, were in the exercise of due care and specifically denied each and every charge of negligence and wilful, wanton and malicious conduct. Defendants further alleged that the accident in question was caused by the wilful, wanton, malicious and reckless conduct of the plaintiff and the manner in which plaintiff's automobile was driven.

It appears further from the facts that on April 10, 1939, Alvin O. French, employed by the plaintiff, was driving a 1939 Mercury Sedan, owned by the plaintiff, west on 75th Street. French says he was traveling about 25 miles per hour straddling the outside or north rail of the west bound street car tracks. The southeast corner of the intersection of 75th Street and Blackstone was vacant and the vision was good from the east. When French was 125 feet east of Blackstone, he saw the Pontiac coupe driven by Shelton traveling north on Blackstone about 200 feet south of 75th Street.

and of 1934, 1935 and 1936 on the grounds of negligence, which occurred
the defendant with negligence and with willful, wanton and malicious
conduct. Defendant's motion for a new trial and motion for judgment
notwithstanding the verdict was denied, and the court having entered
judgment upon the finding, this appeal was taken by defendant.

There is no point raised on the findings except that

plaintiff alleged that the defendant: (1) carelessly, negligently
and recklessly operated an automobile, (2) at a high and unlawful
rate of speed, (b) without keeping a proper lookout, (c) without
giving audible and reasonable warning of its approach, (d) without
stopping said automobile before reaching plaintiff's automobile, (e)
with inefficient and ineffective brakes, and (f) without yielding
the right of way; and that the defendant (2) willfully, wantonly
and maliciously drove said automobile; and that they (3) willfully,
wantonly and maliciously drove said automobile at a high and unlawful
rate of speed. The defendant, however, denied that plaintiff and its
agent, French, were in the exercise of due care and specifically
denied each and every charge of negligence and willful, wanton and
malicious conduct. Defendant further alleged that the conduct in
question was caused by the willful, wanton, malicious and reckless
conduct of the plaintiff and the manner in which plaintiff's automobile
was driven.

It appears further from the facts that on April 10, 1937,
John D. French, employed by the plaintiff, was driving a 1936
Mercury Sedan, owned by the plaintiff, west on 70th Street. French
says he was traveling about 10 miles per hour approaching the intersection
or north end of the west bound street car track. The southeast
corner of the intersection of 70th Street and Washington was vacant
and the vision was good from the west. When French was 100 feet
east of intersection, he saw the Pontiac coupe driven by plaintiff
traveling north on Washington about 100 feet south of 70th Street.

French says he did not estimate the Pontiac's speed at that time. The next time French noticed the Pontiac it was five or six feet from him and about to collide with his Mercury. Following the collision the Mercury ran or was driven into an iron post that holds the trolley wires at the northwest corner of Blackstone and 75th Street. French further testified that he did not remember whether he swerved his automobile to the north just before the collision, that he did not watch nor see the northbound Pontiac after he first saw it about 200 feet south of 75th Street, that the Mercury was in perfect condition and at the speed he was traveling, French said he could have stopped in eight or ten feet. French did not recall blowing his horn and did not know what happened to the Pontiac after the accident.

The defendant, Shelton, was driving the Pontiac north on Blackstone Avenue about three feet from the east curb. As Shelton approached the intersection of Blackstone and 75th Street, he testified he was driving between 20 and 25 miles per hour when he first saw French's Mercury about 150 feet east of Blackstone. From his testimony it appears that the next time he saw the Mercury it was about ten feet from him and the front wheels of his Pontiac were in the center of 75th Street between the eastbound and westbound street car lines. As Shelton approached the intersection he glanced to his left but did not see any approaching vehicles. He testified that he decreased his speed and slowed down at the intersection, going into second speed to cross, and that he then saw the Mercury which was making a sharp swerve to the right as it came into the intersection, then it curved in front of Shelton, the cars collided, and the Mercury continued to roll in a tilted position and landed against the trolley pole at the northwest corner of the intersection. From the testimony of Shelton it appears that as soon as he saw the Mercury he applied his brakes to avoid the collision; that his Pontiac had just come to a stop at the time of the collision; that after the

French says he did not believe the witness's word at that time. The next time French noticed the vehicle it was five or six feet from him and about to collide with his vehicle. Following the collision the Mercury ran on and driven into an iron post near the trolley wires at the northeast corner of Madison and 7th Street. French further testified that he did not remember whether he observed his vehicle to the north just before the collision, that he did not watch her nor the northbound vehicle after he first saw it about 200 feet south of 7th Street, that the Mercury was in contact with the trolley wires at the time of the collision, French said he could have stopped in eight or ten feet. French did not recall whether the horn and did not know what happened to the vehicle after the collision. The defendant, English, was driving the vehicle north on Madison Avenue about three feet from the east curb. He approached the intersection of Madison and 7th Street, he testified he was driving between 20 and 25 miles per hour when he testified French's Mercury about 150 feet east of Madison. French's testimony is accurate that the first time he saw the Mercury it was about ten feet from him and the front wheels of his vehicle were in the center of 7th Street between the eastbound and westbound lanes car lines. As English approached the intersection he turned to his left but did not see any approaching vehicles. He testified that he decreased his speed and slowed down at the intersection, going into second gear to cross, and that he then saw the Mercury about 100 feet away making a sharp turn to the right as it came into the intersection. When it came in front of English, the cars collided, and the Mercury continued to roll in a tilted position and landed against the trolley wire at the northeast corner of the intersection. The testimony of English is accurate that he was at the Mercury he applied his brakes to avoid the collision; that his vehicle did just come to a stop at the time of the collision; that after the

collision the rear wheels of the Pontiac were on the west bound street car track near the middle of Blackstone Avenue; and that it was raining very hard at the time of the accident. Shelton estimated the speed of the Mercury at from 30 to 35 miles per hour at the time of the collision.

It also appears that Shelton's employer, Mrs. Weil, one of the defendants, had telephoned Shelton about twenty minutes before the accident and directed him to pick her up at the Illinois Central Railway Station at 71st Street and Stony Island Avenue. Shelton was chauffeur and houseman for the Weils and was on his way to pick up Mrs. Weil when the accident happened.

Plaintiff's employee, French, was thrown from the car onto the pavement and as a result received a fractured pelvis, collar bone, and several ribs, a punctured lung, and several other injuries. There was evidence heard from witnesses who appeared at the trial and, as we have indicated, the court at the conclusion of the hearing entered the judgment against defendants, from which this appeal is taken.

The first question called to our attention by the plaintiff is that the certificate of the trial court attached to the report of the proceedings does not state that the report of the proceedings contains all of the evidence, and is, therefore, under the authorities, fatally defective. The certificate in the instant case is as follows;

"For as much therefor as the matters and things contained in the foregoing report of proceedings do not otherwise appear of record herein, the defendants tender this, their Report of Proceedings, and pray that the same be signed and sealed by the presiding Judge in this case and made a part of the record herein. Which is done accordingly in said County and State this 7th day of June, A. D. 1940.

"John J. Wallace (Seal)

Judge."

It is urged by plaintiff that the courts of this state have held repeatedly that where the Report of Proceedings fails to state that it contains all of the evidence, a reviewing court will presume there

collided the rear wheels of the Pontiac were on the west bound street car track near the middle of Hixson Street; and that it was raining very hard at the time of the accident. Helton estimated the speed of the Mercury at from 20 to 25 miles per hour at the time of the collision.

It also appears that Helton's employer, Mrs. Bell, one of the defendants, had telephoned Helton about twenty minutes before the accident and directed him to pick her up at the Illinois Central Railway Station at First Street and Stony Island Avenue. Helton was chauffeur and driver for the Bell and was on his way to pick up Mrs. Bell when the accident happened.

Plaintiff's employee, French, was thrown from the car onto the pavement and as a result received a fractured pelvis, collar bone, and several ribs, a fractured lung, and several other injuries. There was evidence heard from witnesses who appeared at the trial and, as we have indicated, the court at the conclusion of the hearing entered the judgment against defendants, from which this appeal is taken.

The first question called for attention by the plaintiff is that the certificate of the trial court attached to the report of the proceedings does not state that the report of the proceedings contains all of the evidence, and is, therefore, under the authorities, fatally defective. The certificate in the instant case is as follows:

"For as much therefore as the nature and things contained in the foregoing report of proceedings do not otherwise appear of record herein, the defendants tender this, their report of proceedings, and pray that the same be signed and sealed by the presiding judge in this case and made a part of the record herein, which is done accordingly in said county and state this 7th day of June, A. D. 1921.

"John L. Wallace (seal)

Judge."

It is urged by plaintiff that the court at this stage have held repeatedly that where the report of proceedings fails to state that it contains all of the evidence, a reviewing court will reverse there

was sufficient evidence before the trial court to sustain the entry of the judgment appealed from, and in support of this contention cites James v. Dexter, et al., 113 Ill. 654; Sheehan v. Bell, 300 Ill. App. 364; Henry v. Halloway, 78 Ill. 356. The defendants, in reply to this contention of plaintiff, point out that the defect, if any existed, was rectified by an amendment duly made to the record herein and allowed and entered by the Appellate Court on December 4, 1940. It is also pointed out that whatever may be said of plaintiff's argument, it must be considered as coming too late and therefore waived, inasmuch as Section 4, Rule 1, Illinois Appellate Court, First District, provides:

"A claim that any matter in the trial court record actually before the court on appeal is not properly authenticated may be raised only by motion filed by appellant or appellee before or at the time of filing his brief. Such motions shall be subject to the provisions of Rule 5, and each motion shall be supported by affidavit showing, not only that the matter complained of is not properly authenticated, but that it is in fact incorrect, and that injury will result to the objecting party because of its inclusion. Unless a motion is made in the manner required by this rule, the record shall be deemed to be correct."

Plaintiff filed no motion in accordance with Section 4, Rule 1.

Defendants further cite subsection 2, section 74, Par. 198, Ch. 110,

Ill. Rev. St. 1937 (Jones Ill. Stats. Ann. 104,074) which reads as

follows:

"All distinctions between the common law record, the bill of exceptions and the certificate of evidence, for the purpose of determining what is properly before the reviewing court, are hereby abolished. The trial court record shall include every writ, pleading, motion, order, affidavit, and other documents filed or entered in the cause and all matters before the trial court which shall be certified as a part of such record by the judge thereof. All matters in the trial court record actually before the court on appeal may be considered by the court for all purposes, but if not properly authenticated, the court may order such further authentication as it may deem advisable."

Further, attention is called that Par. 259.36, Sec. 4, Ch. 110, Ill.

Rev. Stat. 1937, provides the general procedure with reference to

appeals taken to the Appellate or Supreme Court and in section 4

provides;

was sufficient evidence before the trial court to sustain the jury of the judgment appealed from, and in support of said contention cite James v. James, 115 Ill. 404; James v. James, 115 Ill. 404.

384; James v. James, 115 Ill. 404. The defendant, in reply to

this contention of plaintiff, point out that the defect, if any

existed, was rectified by an amendment duly made to the record herein

and affirmed and entered by the Appellate Court on December 4, 1940.

It is also noted out that whatever may be said of plaintiff's contention,

it must be considered as coming too late and therefore waived, inasmuch

as Section 4, Rule 1, Illinois Appellate Court, First District, provides:

"A claim that any matter in the trial court record actually before the court on appeal is not properly authenticated may be raised only by motion filed by plaintiff or appellee before or at the time of filing his brief. Such motions shall be subject to the provisions of Rule 6, and such motion shall be sustained by affidavit showing, not only that the matter complained of is not properly authenticated, but that it is in fact incorrect, and that injury will result to the opposing party because of its inclusion. Unless a motion is made in the manner required by this rule, the record shall be deemed to be correct."

Plaintiff filed no motion in accordance with Section 4, Rule 1.

Defendant further cite subsection 4, Section 74, Par. 103, Ch. 110,

Ill. Stat. 1937 (James Ill. Stat. Ann. 104.074) which reads as

follows:

"All distinctions between the common law record, the bill of exceptions and the certificate of evidence, for the purpose of determining what is properly before the reviewing court, are hereby abolished. The trial court record shall include every writ, pleading, motion, order, affidavit, and other documents filed or entered in the cause and all matters before the trial court which shall be certified as a part of such record by the judge thereof. All matters in the trial court record actually before the court on appeal may be authenticated by the court for all purposes, but it may properly be authenticated by the court only after further authentication as it may deem advisable."

Further, attention is called that Par. 282.16, Sec. 4, Ch. 110, Ill.

Stat. 1937, provides the general procedure with reference to

records taken to the Appellate or Supreme Court and in Section 4

provided;

"A claim that any matter in the trial court record actually before the court on appeal is not properly authenticated may be raised only by motion filed by the appellant or appellee before or at the time of filing his brief. Such motions shall be subject to the provisions of Rule 49 and each motion shall be supported by affidavit showing, not only that the matter complained of is not properly authenticated, but that it is in fact incorrect and that injury will result to the objecting party because of its inclusion. Unless a motion is made in the manner required by this rule, the record shall be deemed to be correct."

Upon consideration of the fact that the record was amended by a proper certificate and after considering the rules and section of the statutes as called to our attention we are of the opinion that the question has been obviated by the amendment, and this appeal, therefore, will be considered on the merits of the cause.

The defendants' first contention is that they were not guilty of wilful and wanton conduct, and suggest that the finding and judgment for the plaintiff was based on the entire complaint which charged both negligence and wilful, wanton and malicious conduct. It is conceded that there is some evidence in the record from which the court could find negligence on the part of the defendant Shelton, the driver of the Pontiac, and it is also conceded that he was the agent of the defendants Weil. However, it is urged that the record completely fails to show any wilful, wanton and malicious conduct on the part of Shelton. It is contended that the undisputed evidence likewise shows that the plaintiff's driver, French, was as much or more so guilty of negligence; that such negligence would be a complete bar to recovery by the plaintiff on the ground of defendant's negligence; and that the trial court apparently so understood the law for he refused to dismiss the wilful, wanton and malicious charges, but on the contrary made a finding on these charges in order to overcome the obvious contributory negligence on the part of plaintiff's driver and agent, French.

The plaintiff, however, insists that the finding and judgment of the trial court is not against the manifest weight of the evidence but, on the contrary, is in accord with it, and calls attention to three points made by defendants: (1) that their acts did not constitute

"I claim that any matter in the trial record presented actually before the court on a motion is not properly distinguished by the raised only by motion filed by the plaintiff or a party before at the time of filing his brief. Such motion shall be subject to the provisions of Rule 45 and each motion shall be supported by affidavits showing, not only that the matter presented is not properly authenticated, but that it is in fact incorrect and that injury will result to the opposing party because of its inclusion. Unless a motion is made in the manner provided by this rule, the record shall be deemed to be correct."

Upon consideration of the fact that the record was amended by a proper certificate and after considering the rules and section of the statutes as called to my attention we are of the opinion that the question has been obviated by the amendment, and this we say, therefore, will be considered on the merits of the cause.

The defendant's first contention is that they were not guilty of willful and wanton conduct, and suggest that the finding and judgment for the plaintiff was based on the entire complaint which charged both negligence and willful, wanton and malicious conduct. It is conceded that there is some evidence in the record from which the court could find negligence on the part of the defendant Nelson, the driver of the tractor, and it is also conceded that he was the agent of the defendant well. However, it is urged that the record completely fails to show any willful, wanton and malicious conduct on the part of Nelson. It is contended that the undisputed evidence likewise shows that the plaintiff's driver, French, was as much or more so guilty of negligence; that such negligence would be a complete bar to recovery by the plaintiff on the ground of defendant's negligence; and that the trial court apparently so understood the law for he refused to dismiss the willful, wanton and malicious charges, but on the contrary made a finding on these charges in order to overcome the obvious contributory negligence on the part of plaintiff's driver and agent, French.

The plaintiff, however, insists that the finding and judgment of the trial court is not against the manifest weight of the evidence but, on the contrary, is in accord with it, and calls attention to

wanton and wilful conduct; or (2) if the defendant's acts constituted wilful and wanton conduct, the plaintiff was also guilty of wilful and wanton conduct, or (3) that the plaintiff's employee was chargeable with contributory negligence, the defendants conceding negligence on their part. It is urged that although no special finding of malice was entered by the trial court, there is clearly sufficient evidence in the record to sustain the charge of wilful and wanton conduct on the part of the defendant, Shelton. There is evidence of two witnesses in this record that the defendant, Shelton, was driving on Blackstone Avenue at a speed of from 35 to 45 miles per hour; that plaintiff's employee was driving west on 75th Street at 25 miles per hour, straddling the north rail of the west bound street car tracks; that it was raining at the time; that plaintiff's Mercury had entered the intersection of 75th Street and Blackstone Avenue before defendant's Pontiac, and had passed the center line of Blackstone Avenue, when defendant, Shelton, driving north on Blackstone Avenue at a rate of speed of about forty miles per hour, and without slackening his speed at any time before entering the intersection, crashed into the left rear side of plaintiff's Mercury, and as a result of the impact, the plaintiff's Mercury was hurled against an iron trolley post on the northwest corner of the intersection, with such force that the Mercury was damaged by the collision with this iron post.

Plaintiff urges that wanton and malicious conduct has been defined by the courts of this state, as:

"An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person, or property of others such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness such as charges the person whose duty it was to exercise care with the consequences of a wilful injury. Walldren v. Krug, 291 Ill. 472;" Layton v. Ogonoski, 256 Ill. App. 461.

The defendant Shelton knew that he was approaching 75th Street, a street wider than the one on which he was traveling and on which were located two sets of street car tracks, a street which in all

wanton and willful conduct; or (7) if the defendant's acts constituted willful and wanton conduct, the plaintiff was also guilty of willful and wanton conduct, or (8) that the plaintiff's injuries were caused in whole or in part by the defendant's negligence, the defendant's negligent negligence on their part. It is urged that although no specific finding of negligence was entered by the trial court, there is clearly sufficient evidence in the record to sustain the charge of willful and wanton conduct on the part of the defendant, Shelton. There is evidence of two witnesses in this record that the defendant, Shelton, was driving on Blackstone Avenue at a speed of from 35 to 45 miles per hour; that plaintiff's employee was driving west on 75th Street at 25 miles per hour, straddling the north side of the west bound street car track; that it was raining at the time; that plaintiff's Mercury had entered the intersection of 75th Street and Blackstone Avenue before defendant's Pontiac, and had passed the center line of Blackstone Avenue, when defendant, Shelton, driving north on Blackstone Avenue at a rate of speed of about forty miles per hour, and without slackening his speed at any time before entering the intersection, crashed into the left rear side of plaintiff's Mercury, and as a result of the impact, the plaintiff's Mercury was hurled against an iron trolley post on the northeast corner of the intersection, with such force that the Mercury was damaged by the collision with this iron post.

Plaintiff urges that wanton and willful conduct has been defined by the courts of this state, as:

"An intentional disregard of a known duty necessary to the safety of the person or property of another, and an active desire to care for the life, person, or property of others such as would constitute negligence to constitute, makes a case of wanton negligence or legal willfulness such as charges the person whose duty it was to exercise care with the consciousness of a willful injury. Wright v. Ryan, 231 Ill. 472; Layton v. O'Connell, 232 Ill. 401, 402.

The defendant Shelton knew that he was approaching 75th Street, a street wider than the one on which he was traveling and on which were located two sets of street car tracks, a street which all

likelihood would be much more heavily traveled than a street upon which there was no street car tracks. Shelton testified that he saw the plaintiff's automobile approaching from the right. He knew or should have known that plaintiff's automobile, under the laws of this state had the right of way at the intersection, and that it was his duty to yield that right of way to the plaintiff. The statute upon this subject, Par. 165, Chap. 95 $\frac{1}{2}$, Ill. Rev. Stat., 1939, provides;

"Except as hereinafter provided motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left."

When we come to consider the facts as they were presented to the court who heard this, there was a duty on the part of Shelton to proceed at a rate of speed, as he was traveling in rainy weather onto a wider street on which were located street car tracks, so as not to culminate in injury to other persons and property rightfully there. His conduct as it appears from this record might well be held to show a conscious indifference to the consequences of his acts, when we consider that at the time he sped into the intersection there is evidence that he was going forty miles per hour, and that he did not slow up in the slightest, and that the crash occurred at a point in the intersection where plaintiff's automobile had already traversed the center line of Blackstone Avenue. The plaintiff's employee, as we gather from this evidence, was not guilty of wilful and wanton conduct or of contributory negligence. It seems that defendants do contend that if defendant, Shelton, was guilty of wanton and wilful conduct, then plaintiff's employee, French, was also guilty of wilful and wanton conduct, and cite a number of cases in support of their theory. However, we are of the opinion that French was not guilty of wilful or wanton conduct. Under the statute French had the right-of-way and as we have already stated, the defendant Shelton was traveling at a rate of speed which did not indicate that he so controlled the movements of his automobile as

likewise would be much more heavily involved than a street upon which there was no street car track. Weston testified that he saw the plaintiff's automobile approaching from the right, he knew or should have known that plaintiff's automobile, under the laws of this state had the right of way at the intersection, and that it was his duty to yield that right of way to the plaintiff. The statute upon this subject, Car. 105, Chas. 105, III. Rev. Stat., 1925, provides;

"Except as hereinafter provided motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left."

When we come to consider the facts as they were presented to the court we heard that, there was a duty on the part of Weston to proceed at a rate of speed, as he was traveling in rainy weather onto a street upon which were located street car tracks, so as not to endanger in injury to other persons and property negligently there. We cannot as it appears from this record might be held to show a conscious indifference to the consequences of his acts, when we consider that at the time he sped into the intersection there is evidence that he was going forty miles per hour, and that he did not slow up in the slightest, and that the crash occurred at a point in the intersection where plaintiff's automobile had already traversed the center line of Jackson Avenue. The plaintiff's explosive, as we gather from this evidence, was not guilty of either and Weston conducted an of contributory negligence. It seems that defendant do contend that at defendant, Weston, was guilty of Weston and that defendant, then plaintiff's explosive, turned, was also guilty of willful and wanton conduct, and that a number of cases in support of their theory. However, as one of the cases that Weston was not guilty of willful or wanton conduct. Under the evidence which had the right-of-way and as we have already stated, the defendant Weston was traveling at a rate of speed which did not indicate that he was conducting his automobile at his automobile at

not to collide with the plaintiff's car. The plaintiff contends that the acts of plaintiff's employee, French, were the acts of any ordinarily prudent person under the same or similar circumstances; that in the light of all the evidence in the record, plaintiff's employee did everything an ordinarily prudent person would do under the same conditions; and that far from constituting wanton and malicious conduct on the part of the plaintiff's employee, these facts show that he was free of any negligence whatsoever.

Upon the question of right-of-way at the intersection, the plaintiff cites the case of Partridge v. Eberstein, 225 Ill. App. 209, where it appears that plaintiff was driving west on 76th Street and the defendant was driving north on Louella Avenue. One witness testified that both cars were going from 30 to 35 miles per hour. Defendant testified that he saw plaintiff's car when it was 75 feet east of Louella Avenue, when he, the defendant, was about 25 feet south of 76th Street. In the opinion the court said;

"Whatever the exact distance may have been, it is apparent that plaintiff's automobile was approaching the intersection of the highways from the right and that under the statute it was the duty of defendant to give the right of way to plaintiff's automobile. The evidence, however, tends to show that each automobile proceeded on its way until the collision occurred.

"This court has recently had occasion to apply this rule of the right of way. In Lenartz v. Funk, 224 Ill. App. 180, opinion by Mr. Presiding Justice Gridley, it was held that as plaintiff's car was approaching from the right, under the statute it had the right of way, and that it was the duty of the driver of the other car approaching the intersection 'to then stop it, or sufficiently check its speed, so as to allow plaintiff's car to pass in front of it.' * * *

"We are earnestly urged by counsel for plaintiff to fix definitely the distance of an automobile from a street intersection when it can be said to be within the statutory description of a vehicle 'approaching along intersecting highways from the right'. While we hold that plaintiff's automobile, according to the evidence before us, came within this description, it would be very difficult, if not impossible, to lay down a rule in precise terms of measurement applicable to all cases. However, we suggest this: That a vehicle is approaching an intersection from the right, within the meaning of the statute, and entitled to the right of way when, on its left, on an intersecting street, another vehicle is approaching whose driver, in the exercise of due care, would or should see that unless he yielded the right of way the vehicles might or would collide."

Again, in the case of Riddle v. Mansager, 254 Ill. App. 68, plaintiff was a passenger in Strede's car which was proceeding east on North Avenue, and the defendant, Mansager, was driving north on Bevier Street in Aurora, Illinois. Streede's car entered the intersection first and was at least two-thirds of the way across the intersection when the collision occurred. The testimony showed that the car driven by Mansager struck the Streede car at the right rear wheel, spun it around and then the Streede car finally turned over at a point east of the intersection. Mansager testified that Streede's car was 70 to 75 feet west of the intersection when he first saw it and that his own car was then 60 to 65 feet south of the same point. In that case the court said;

"The driver approaching from the right has the right of way over one approaching from the left, unless the car on the right is sufficiently far away, so that if being driven with due care, it will not reach the intersection until the car from the left can pass * * *. Any other interpretation of the statute would encourage racing to the intersection. It is the purpose of the law to give the driver on the right a preference in passing through the intersection and it is the duty of the driver on the left to respect that right in accordance with the rule herein laid down. A driver on the left owes a duty to the driver on his right to approach an intersection with sufficient care to permit the latter to exercise his right of way."

The plaintiff further cites as to the same effect, Johnson v. Duke, 247 Ill. App. 372; Zapf v. Cutton, 229 Ill. App. 406; McCarthy v. Fadin, 236 Ill. App. 300; Fisher v. Johnson, 238 Ill. App. 25. Upon consideration of all the evidence the trial court reached the conclusion that French had the undoubted right-of-way and that Shelton's conduct in dashing through the intersection showed a conscious indifference to the duty he owed to cars approaching from the right.

When we come to consider the questions of wilful and wanton conduct, negligence and of contributory negligence, we find that these are questions of fact for the consideration of the jury. In non-jury cases the finding of the trial court is entitled to the same weight as the verdict of a jury. In the case now here on appeal the trial

court heard and saw the witnesses and in passing upon their credibility had the opportunity to consider their appearance, conduct and demeanor, their candor, fairness, and the probability or improbability of their statements. Under the rule that applies it was exclusively within the province of the court to determine the weight and credence to be given to the respective witnesses. It appears upon this question that the trial court, no doubt, considered the evidence of the several witnesses and as to whether there was contradictions in their statements, and reached the conclusion that the plaintiff had sustained its case.

Under the circumstances we are of the opinion that the finding of the trial court was supported by the evidence and this court will be unable to hold, upon the record and briefs in this case, that the judgment entered is so manifestly contrary to the preponderance of the evidence as to require reversal. On the contrary, we believe that the judgment entered by the court was fully justified and it is therefore affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN AND BURKE, JJ. CONCUR.

court heard and saw the witnesses and in reaching upon their credibility had the opportunity to consider their appearance, conduct and answers, their conduct, fairness, and the probability or improbability of their statements. Under the rule that applies it was accordingly within the province of the court to determine the weight and credence to be given to the respective witnesses. It appears upon this question that the trial court, no doubt, considered the evidence of the several witnesses and as to whether there was contradiction in their statements, and reached the conclusion that the plaintiff had sustained its case.

Under the circumstances we are of the opinion that the finding of the trial court was supported by the evidence and this court will be unable to hold, upon the record and briefs in this case, that the judgment entered is so manifestly contrary to the preponderance of the evidence as to require reversal. On the contrary, we believe that the judgment entered by the court was fully justified and it is therefore affirmed.

JUDGMENT AFFIRMED.

DENIS E. McLEVIN AND OTHERS, PLAINTIFFS, VS. COURT.

41508

JOHN KRAUTSCHER,

Appellee,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

C. R. MILEY,

Appellant.

311 I.A. 242

MR. PRESIDING JUSTICE REBEL DELIVERED THE OPINION OF THE COURT:

This is an appeal by the defendant from an order entered on June 18, 1940, to amend an order of December 6, 1939. The order and judgment of December 6, 1939, is as follows;

"Motion plaintiff jury waived and trial ex parte by Court finding defendant C. R. Miley guilty as charged in plaintiff's statement of claim damages \$650.00 in Tort. Judgment on finding versus C. R. Miley \$650.00 and costs special finding of malice and malice body execution to issue."

The order appealed from is as follows;

"Motion defendant C. Miley that order of May 3rd, 1940 be vacated and set aside sustained. Order of court correcting judgment order of December 6, 1939 to read as follows: Jury waived, Trial ex parte by court - court finds defendant C. R. Miley guilty of Tort as charged in statement of claim. The court further finds malice was the gist of the action and assesses damages at \$650.00. Judgment on finding against defendant C. R. Miley for \$650.00 and costs and that execution issue against the body of defendant. Appeal Bond set at \$750.00."

In support of plaintiff's motion to amend the order of December 6, 1939, a sworn petition was filed, alleging that the court made a finding that the defendant was guilty of malicious conduct and that malice was the gist of the action, and that a memorandum of said finding appears on the file, which was transcribed by the Clerk to read: "Special finding of malice, body execution to issue." The petitioner asks that the court correct its judgment to read; "Court finds defendant C. R. Miley, guilty of tort, as charged in statement of claim and the Court further finds that malice is the gist of the action and assesses damages at \$650.00 and costs and execution to issue against the body of defendant nunc pro tunc as of December 6, 1939."

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THE UNIVERSITY OF MICHIGAN LIBRARY

This is an appeal to the Commission to take action to prevent the further spread of this disease.

June 18, 1940, to among an order of December 8, 1939. The order was

[Statement of member, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 262

body execution to issue."

The order specified from is as follows;

at \$20.00." That execution issue against the body of defendant, James Earl Ray, was on a finding against defendant. A. Ray for \$50.00 and costs and was the first of the action and against a damages of \$500.00. Defendant Ray was charged in statement of claim. The court further finds that Ray gave to court - court finds defendant B. A. Ray guilty of an order of December 6, 1967 to read as follows: Jury advised, trial was held and a verdict rendered. Order of court according to judgment "action defendant B. Ray that order of July 27, 1968 as

In support of Plaintiff's motion to amend the order of

December 6, 1955, a sworn petition was filed, alleging that the defendant made a finding that the defendant was guilty of malicious conduct and that malice was the gist of the action, and that a determination of said finding occurred on the 11th, which was transcribed by the clerk as read: "Special finding of malice, body extension to issue." The

The Court further finds that while it is true that Linda defendant U. S. Attorney, William H. Burt, was involved in the investigation of the case and the Court further finds that while it is true that

[illegible]

Issue against the body of defendant was filed on 12/20/2011.

On the hearing of the motion the clerk of the court testified that he made an entry on the file "Jury Waived, ex parte, \$650.00, and costs, special malice"; that his entry in the minute book reads, "Jury Waived, trial ex parte by court defendant guilty, damages \$650.00, and costs special malice". The half sheet was offered in evidence and the order of December 6, 1939, was read in the record.

It is the contention of the defendant that the Municipal Court has control over its records and proceedings for a period of 30 days, but after such period its power to amend is confined to clerical errors and matters of mere form, and these may be corrected to make the record conform to the fact; but that the plaintiff failed to produce such evidence required by law to warrant the court in correcting its order after 30 days from the date judgment was rendered, and that the action of the trial judge in correcting the judgment was erroneous and contrary to law.

While the petition to correct the judgment was presented more than 30 days after the entry of the original judgment, the court had the power to correct such a judgment where the motion was based upon written memoranda identified by the clerk of the court and admitted to be part of the records of the court, and where the judgment to be changed was changed in wording and form only. One of the rules of the Municipal Court in force June 18, 1940, permitted the correction of clerical mistakes in judgments or records of judgments at any time upon due notice and motion to the opposing party. Rule 130 of Revised Civil Practice Rules provides that "Clerical mistakes in judgments or orders or errors, arising therein from any accidental slip or omission, may at any time be corrected by the court on motion, and the court may, at any time, and on such terms as to costs or otherwise as the court may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

real question or issue raised by or depending on the proceedings.

any think just, would any defect or error in any proceedings, and all

at any time, and on such terms as to costs or otherwise as the court

may at any time be satisfied by the court on motion, and the court may

orders or decrees, arising therein from any accidental slip or omission,

Civil Practice Rules provided that clerical mistakes in judgments or

upon due notice and motion as the necessary party. Rule 100 of Rules

clerical mistakes in judgments or records of judgments at any time

Municipal Court in force June 15, 1940, provided the correction of

changed was changed in writing and form only. One of the rules of the

to be part of the records of the court, and where the judgment is so

upon written memoranda identified by the clerk of the court and admitted

had the power to correct such a judgment where the motion was made

more than 30 days after the entry of the original judgment, the court

While the petition to correct the judgment was presented

erroneous and contrary to law.

and that the action of the trial judge in correcting the judgment was

correcting the order after 30 days from the date judgment was rendered,

to produce such evidence required by law to sustain the court in

to make the record conform to the fact; but that the plaintiff failed

clerical errors and matters of mere form, and there may be corrected

30 days, but after such period its power to amend is confined to

Court had control over its records and proceedings for a period of

It is the contention of the defendant that the municipal

order of December 6, 1939, was read in the record.

costs awarded notice. The bill does not appear in evidence and was

reads, trial by jury by court judgment finally, December 1939, and

costs, special notice; that his entry in the minute book reads, "jury

that he made an entry on the file "jury waived, on notice, 1939, and

on the hearing of the motion the clerk of the court certified

From the briefs filed in this action, there appears to be no dispute between the parties as to the power and authority of the trial court to amend its record after 30 days had elapsed, following the entry of judgment, where the court had preserved some memorial or record of its judgment, and where the amendment related to the form or language of said judgment. Among several of the cases cited and called to our attention, is the case of Gebhard v. Brewers Malting Company, 185 Ill. App. 254, wherein it appears that the trial court had the power to amend its record from "Seventeen hundred and thirty and sixty cents" to "Seventeen Hundred thirty dollars, sixty cents", after the expiration of 30 days. To the same effect is the case of Kowalski v. Nicholson, 23 Cal. App. 160, in which case a nunc pro tunc order was sustained permitting an amendment to the original order of dismissal for want of prosecution to include language providing for the return of property to defendant which had been previously taken from her. In this case the court held that in a case for claim and delivery (replevin) where a plaintiff has secured possession of the property and the defendant obtained a dismissal of the action for want of prosecution, the court could enter a nunc pro tunc order to direct the return of the property to the defendant where the original order inadvertently omitted to direct said return of said property.

In the case before us the trial court found the defendant guilty in tort and assessed the damages at \$650.00, and further expressly found the defendant guilty of malicious conduct in such form as to order the issuance of a body execution. When the court discovered the inadvertent entry of its clerk in reducing its findings to judgment, he could rightfully correct the clerical mistake and change the language of the finding to conform with the original decision, a memorandum of which was preserved in the clerk's minute book which was used in the courtroom on the date of the entry of the judgment wherein the special finding of malice appeared in the clerk's handwriting as "Spec. Mal.". This entry was made by the clerk, pursuant to general instruction from the court. The clerk testified that on the same day that the

from the state filed in this action, there appears to be no dispute between the parties as to the power and authority of the trial court to award its record after 30 days had elapsed, following the entry of judgment, where the court had previously some monetary record of its judgment, and where the amendment related to the same language of said judgment. Among several of the cases cited and relied to our attention, is the case of Roberts v. Roberts, 195 Ill. App. 2d, 195, wherein it appears that the trial court had the power to award its record from "eventual hundred and thirty and sixty cents" to "eventual hundred thirty dollars, sixty cents", after the expiration of 30 days. To the same effect is the case of Roberts v. Roberts, 195 Ill. App. 2d, 195, in which case a quasi in rem order was sustained permitting an amendment to the original order of judgment for want of prosecution to include language providing for the return of property to defendant which had been previously taken from him. In this case the court held that in a case for claim and delivery (replevin) where a plaintiff has secured possession of the property and the defendant obtained a dismissal of the action for want of prosecution, the court could enter a quasi in rem order to direct the return of the property to the defendant where the original order was previously related to direct said return of said property.

In the case before us the trial court found the defendant guilty in fact and assessed the damages at \$500.00, and further summarily found the defendant guilty of malicious conduct in such form as to order the issuance of a body warrant. When the court discovered the inadvertent entry of its clerk in reducing its findings to judgment, it would rightfully correct the clerical mistake and change the language of the findings to conform with the original decision, a correction which was suggested in the clerk's minute book which was used in the courtroom on the date of the entry of the judgment wherein the clerical finding of malice appeared in the clerk's handwriting as "mal. del.". This entry was made by the clerk, pursuant to general instructions from the court. The clerk testified that on the same day that the

above minutes were written by him, he entered on the regular court records kept by the Municipal Court in such cases, and known as the "half-sheet", the further entry reciting the finding against the defendant in the sum of \$650.00 in tort, the further finding of "Spec. findg. of malice and malice body execution to issue." It was upon this memoranda before the court that the record was changed.

There is a further case that was before this court upon a like question, entitled Mazor & Cohen v. Handler, 208 Ill. App. 312. The clerk there erroneously entered of record - as a denial of a motion to vacate a judgment - an order denying a motion to quash an execution issued on the judgment. It was held that the trial court could amend its record after 30 days had elapsed following the entry of said original judgment, so as to permit the order of the court to be motion of defendant to vacate judgment denied, instead of motion of defendant to quash execution denied.

Taking into consideration the facts as they are stated here, and the memoranda that was made at the time the judgment order was entered, we are of the opinion that the court was fully justified in amending its original order - after 30 days had elapsed following the entry of said order - as was done in this case.

The order appealed from will, therefore, be affirmed.

AFFIRMED.

DENIS E. SULLIVAN AND BURKE, JJ. CONCUR.

above minutes were written by him, as stated on the regular court records kept by the Municipal Court in such cases, and known as the "half-sheet", the further entry reciting the finding against the defendant in the sum of \$500.00 in favor, the further finding of "guilty, of malice and willful body extension to issues." It was upon this memoranda before the court that the record was changed.

There is a further case that was before this court upon a

like question, entitled Wheat v. Wheat, 208 Ill. App. 210.

The clerk there erroneously entered of record - as a denial of a motion to vacate a judgment - an order denying a motion to grant an extension issued on the judgment. It was held that the trial court could amend its record after 30 days had elapsed following the entry of said original judgment, so as to permit the order of the court to be motion of defendant to vacate judgment denied, instead of motion of defendant to grant extension denied.

Saying into consideration the facts as they are stated here,

and the arguments that were made at the time the judgment order was entered, we are of the opinion that the court was fully justified in amending its original order - after 30 days had elapsed following the entry of said order - as was done in this case.

The order appealed from will, therefore, be affirmed.

AFFIRMED.

WILLIAM E. BELLER AND OTHERS, JJ. CONCUR.

41508

JOHN KRAUTSEIDER,

APPEAL FROM

Appellee,

MUNICIPAL COURT

v.

C. R. MILEY,

OF CHICAGO.

Appellant.

311 I.A. 242²

OPINION ON REHEARING

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

The court has considered the petition of appellant for rehearing which was filed and the answer of appellee-plaintiff to said petition. It appears that appellant is in error in referring to John Krautseider as the appellant, whereas the appellant is C. R. Miley and John Krautseider is the plaintiff and appellee in this cause. The appellant contends in the petition for rehearing that no error or mistake was made in entering up the judgment, but that the trial judge changed the form of the judgment because he corrected the finding of malice in the judgment such as would support a body execution. The trial court, however, in considering the questions before it on hearing corrected the form of the judgment, which correction was based upon a written memorandum made by the clerk of the court at the time the judgment was entered. Upon motion of the plaintiff supported by plaintiff's sworn petition, the court considered the facts and the law as applied to a case of character before it. The petitioner asked that the court correct the judgment to read "Court finds defendant C. R. Miley, guilty of tort, as charged in statement of claim and the court finds that malice is the gist of the action and assesses damages at \$650.00 and costs and execution to issue against the body of defendant nunc pro tunc as of December 6, 1939." While the petition to correct the judgment was presented more than 30 days after the entry of

JOHN KRATZKE, v. C. R. MILY.
 Appellant, v. Appellee.
 CIRCUIT COURT OF CHICAGO.

3111 A. 242

MR. JUSTICE EDWARD BREWER, D. C. CHICAGO, IN THE COURT:

The court has considered the petition of appellant for rehearing which was filed and the answer of appellee-plaintiff to said petition. It appears that a writ is in error in relation to John Kratzke as the appellant, whereas the appellee is C. R. Mily and John Kratzke is the plaintiff and appellee in this cause. The appellant contends in the petition for rehearing that no error or mistake was made in entering up the judgment, but that the trial judge changed the form of the judgment because he corrected the finding of malice in the judgment such as would support body execution. The trial court, however, in considering the questions before it on having corrected the form of the judgment, which correction was based upon a written memorandum made by the clerk of the court at the time the judgment was entered. Upon motion of the plaintiff supported by plaintiff's sworn petition, the court considered the facts and the law as applied to a case of character before it. The petition now asked that the court correct the judgment to read "Every time defendant C. R. Mily, guilty of tort, as charged in statement of claim and the court finds that malice is the gist of the action and assessed damages at \$100.00 and costs and execution to issue against the body of defendant John Kratzke as of December 5, 1905." While the petition is correct the judgment was presented more than 30 days after the entry of

the original judgment, the court had the power to correct such a judgment where the motion was based upon written memoranda identified by the clerk of the court and admitted to be part of the records of the court, and where the judgment to be changed was changed in form only.

Upon the facts as they appear and upon the authorities of law considered by this court, including the case of Peiffer v. French, 376 Ill. 376, the trial court was fully justified in correcting the form of the judgment that was entered and now before this court. From the briefs filed in the action there seems to be no dispute as to the power and authority of the trial court to amend its record after 30 days had elapsed, where the court had preserved some memorial or record of its judgment, and where the amendment related to the form or language of said judgment.

We have reached the conclusion that the court was fully justified in correcting the form of the judgment, after considering the facts and authorities as indicated, and, considering the opinion that has been filed on this question, we adhere to the opinion. We reach the conclusion that the rehearing as prayed for by the defendant-appellant be denied.

REHEARING DENIED.

P.J
BURKE/AND DENIS E. SULLIVAN, JJ. CONCUR.

the original judgment, the court had the power to correct such a judgment where the motion was based upon written memoranda identified by the clerk of the court and admitted to be part of the records of the court, and where the judgment to be changed was changed in form only.

Upon the facts as they appear and upon the application of law considered by this court, including the case of Ellis v. French, 176 Ill. 375, the trial court was fully justified in correcting the form of the judgment that was entered and now before this court. From the briefs filed in the action there seems to be no dispute as to the power and authority of the trial court to amend its record after 30 days has elapsed, where the court has reserved some material or record of its judgment, and where the amendment related to the form or language of said judgment.

We have reached the conclusion that the court was fully justified in correcting the form of the judgment, after considering the facts and authorities as indicated, and, considering the opinion that has been filed on this question, we adhere to the opinion. We reach the conclusion that the rehearing as prayed for by the defendant-appellant be denied.

REHEARING DENIED.

WILLIAM J. ELLIS, JR., JUDGE.

41585

WILLIAM GRAT,

APPEAL FROM

STREET COURT

GUY A. RICHARDS
doing business

et al., as receiver

COOK COUNTY.

CHICAGO STREET RAILWAY

appellees.

3111.A. 242³

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is an appeal by the plaintiff from a judgment entered by the court in favor of the defendants, notwithstanding the verdict of a jury.

On May 15, 1938, the plaintiff was riding as a guest in the back seat of an automobile traveling North on Damen Avenue in the City of Chicago. A street car of the defendants was traveling south on Damen Avenue and while making a left turn at 14th Street collided with the automobile in which plaintiff was riding, injuring the plaintiff. In plaintiff's complaint, filed September 20, 1938, it is charged in substance that the defendants by their agents and servants negligently (2) failed to keep a proper lookout for other vehicles; (3) operated said street car at a high and dangerous rate of speed; (4) made a left turn without giving any warning or sounding any bell or signal; (5) failed to provide said street car with suitable brakes or stopping devices; and (6) proceeded to make a left turn without giving the right of way to the automobile in which plaintiff was riding.

In defendant's answer, they denied generally all of the charges of negligence and denied that the plaintiff was in the exercise of ordinary care for his own safety on the occasion in question. A trial was had before the court and a jury. At the close of plaintiff's evidence the defendants moved for a directed verdict of not guilty, and the court reserved ruling thereon. At the close of all the evidence the defendants renewed their motion for a directed verdict

WILLIAM C. ...

... ..

... ..

... ..

GUY A. ...
doing business as ...

41868
WILLIAM C. ...

... ..

This is an appeal by the plaintiff from a judgment entered by the court in favor of the defendants, notwithstanding the verdict of a jury.

On May 18, 1936, the plaintiff was riding as a guest in the back seat of an automobile traveling north on Damen Avenue in the City of Chicago. A street car of the defendants was traveling south on Damen Avenue and while making a left turn at 14th Street collided with the automobile in which plaintiff was riding, injuring the plaintiff. In plaintiff's complaint, filed September 30, 1936, it is charged in substance that the defendants by their agents and servants negligently (1) failed to keep a proper lookout for other vehicles; (2) operated said street car at a high and dangerous rate of speed; (3) made a left turn without giving any warning or sounding any bell or signal; (4) failed to provide said street car with suitable brakes or stopping devices; and (5) proceeded to make a left turn without giving the right of way to the automobile in which plaintiff was riding.

In defendants' answer, they denied adversely all of the charges of negligence and denied that the plaintiff was in the automobile at the time of the accident. At the close of plaintiff's trial was had before the court and a jury. At the close of plaintiff's evidence the defendants moved for a directed verdict of not guilty, and the court reserved ruling thereon. At the close of all the evidence the defendants renewed their motion for a directed verdict

of not guilty, and the motion was allowed as to paragraphs or charges, 3, 5 and 6, and the court reserved his ruling as to paragraphs or charges, 2 and 4. The case was submitted to the jury on the questions of whether the motorman negligently failed to keep a proper lookout for other vehicles; whether he failed to give a proper warning before making a left turn; and whether the plaintiff exercised due care for his own safety. No objections were made by either party with reference to the given or refused instructions. The jury returned a verdict finding the defendants guilty and assessing the plaintiffs damages at the sum of \$5,000, and a judgment was entered upon the said verdict in favor of the plaintiff and against the defendants for the sum of \$5,000.

Thereafter, on June 5, 1940, the defendants filed their motion for a judgment notwithstanding the verdict, giving as grounds for said motion, in substance, (1) that the court should have directed a not guilty verdict at the close of the plaintiff's evidence; (2) that the court should have directed a not guilty verdict at the close of all the evidence; (3) that the evidence did not show that the negligence on the part of the defendants was the proximate cause of the injuries to the plaintiff; (4) that the evidence did not show that the defendants were guilty of negligence as charged in the complaint; (5) that the evidence did not show that at the time and place in question the plaintiff was in the exercise of due care for his own safety; (6) that the evidence did not tend to prove the cause of action alleged in the complaint; (7) that the complaint did not state a cause of action against the defendants; (8) that no cause of action against the defendants was stated in the complaint. On July 11, 1940, a judgment order was entered allowing the said motion of the defendant for a judgment notwithstanding the verdict, which is the judgment order appealed from in this case.

of not guilty, and the motion was allowed as the paragraphs or chapters, 3, 5 and 6, and the court reserved his ruling on the remaining charges, 2 and 4. The case was submitted to the jury on the questions of whether the motorist negligently failed to keep a proper lookout for other vehicles; whether he failed to give a proper warning before making a left turn; and whether the plaintiff exercised due care for his own safety. No objections were made by either party with reference to the given or refused instructions. The jury returned a verdict finding the defendants guilty and assessing the plaintiff's damages at the sum of \$5,000, and a judgment was entered upon the said verdict in favor of the plaintiff and against the defendants for the sum of \$5,000.

Thereafter, on June 5, 1940, the defendants filed their motion for a judgment notwithstanding the verdict, giving as grounds for said motion, in substance, (1) that the court should have directed a not guilty verdict at the close of the plaintiff's evidence; (2) that the court should have directed a not guilty verdict at the close of all the evidence; (3) that the evidence did not show that the negligence on the part of the defendants was the proximate cause of the injuries to the plaintiff; (4) that the evidence did not show that the defendants were guilty of negligence as charged in the complaint; (5) that the evidence did not show that at the time and place in question the plaintiff was in the exercise of due care for his own safety; (6) that the evidence did not tend to prove the cause of action alleged in the complaint; (7) that the complaint did not state a cause of action against the defendant; (8) that no cause of action existed against the defendants as stated in the complaint. On July 11, 1940, a judgment order was entered allowing the said motion of the defendant and for a judgment notwithstanding the verdict, which is the judgment order appealed from in this case.

The accident in question took place about 11:55 O'clock on the night of Sunday, May 15, 1938, at the intersection of Damen Avenue and 14th Street. Damen Avenue runs north and south and has two sets of street car tracks for northbound and southbound street cars. It is about 38 feet wide from curb to curb. 14th Street begins at Damen Avenue running east. It is about 38 feet wide from curb to curb and also has two sets of street car tracks. Westbound 14th Street cars turn north on Damen Avenue, and eastbound 14th Street cars run south on Damen Avenue and turn east on 14th Street. Damen Avenue street cars go straight north or south on Damen Avenue, while 14th Street cars go south on Damen Avenue as far as 14th Street and then make a left turn east on 14th Street. According to the motorman, there are more Damen Avenue street cars that go straight south than 14th Street cars that turn east into 14th Street, and also, according to the motorman, the left turn at that corner is an unusually sharp one and, of the four turns in the course of his run, that one is the sharpest turn he makes. On Damen Avenue, beginning about 72 feet south of the north building line of 14th Street, there is a viaduct running from that point southward about three blocks to 17th Street. The switch on the Damen Avenue car track, where the 14th Street cars turn, begins at the north building line of 14th Street. The street level on Damen Avenue is about 3 feet 4 inches lower at the viaduct than it is at the intersection of 14th Street. Southbound traffic on Damen Avenue moves downgrade from the intersection of 14th Street to the viaduct, while northbound traffic on Damen Avenue from the viaduct to 14th Street moves upgrade.

About 7:30 o'clock in the evening of May 15, 1938, Edward Zator, the driver of the automobile in question, conveyed his sister to a dance and was to call for her about 12:30 that night.

The assistant in question took leave about 11:30 o'clock on the night of Sunday, May 16, 1938, at the intersection of Damen Avenue and 14th Street. Damen Avenue runs north and south and the two sets of street car tracks for northbound and southbound street cars. It is about 25 feet wide from curb to curb. 14th Street begins at Damen Avenue running east. It is about 15 feet wide from curb to curb and also has two sets of street car tracks. Westbound 14th Street cars turn north on Damen Avenue, and eastbound 14th Street cars turn south on Damen Avenue and turn east on 14th Street. Damen Avenue street cars go straight north or south on Damen Avenue, while 14th Street cars go south on Damen Avenue as far as 14th Street and then make a left turn east on 14th Street. According to the motorman, there are more Damen Avenue street cars that go straight south than 14th Street cars that turn east into 14th Street, and also, according to the motorman, the left turn at that corner is an unusually sharp one and, of the four turns in the course of his run, that one is the sharpest turn he makes. On Damen Avenue, beginning about 75 feet south of the north building line of 14th Street, there is a viaduct running from that point southeast about thirty blocks to 17th Street. The viaduct on the Damen Avenue car track, where the 14th Street cars turn, begins at the north building line of 14th Street. The street level on Damen Avenue is about 5 feet 4 inches lower at the viaduct than it is at the intersection of 14th Street. Southbound traffic on Damen Avenue moves downgrades from the intersection of 14th Street to the viaduct, while northbound traffic in Damen Avenue from the viaduct to 14th Street moves upgrades.

About 7:30 o'clock in the evening of May 16, 1938, Edward Jeter, the driver of the automobile in question, conveyed his sister to a dance and was to call for her about 12:30 that night.

The automobile was hers, while the license was in the name of their mother. At that time a friend of Edward Zator, Zeno Grodecki, accompanied him. After taking his sister to the dance, they passed by the home of plaintiff and invited him for a ride. The three of them drove around in the neighborhood all evening and for some time were in Douglas Park. Edward Zator and Zeno Grodecki sat in the front of the automobile, and plaintiff sat in the back seat all of the time, Edward Zator driving the automobile. At 11:45 o'clock, they started driving towards the dance hall, which was at Madison Street and Hamlin Avenue, to pick up Zator's sister. They drove north on Damen Avenue from 21st Street and from 17th Street they drove under the viaduct north towards 14th Street, driving on the east side of Damen Avenue, with the right wheels of the automobile slightly over the extreme east rail of the northbound tracks. There was no other traffic there, and the entire three blocks under the viaduct, as well as the intersection of Damen Avenue and 14th Street, were well lighted, and the street was dry. The lights in the street car as well as in the headlights of the automobile were on at the time of the accident. It is suggested by the plaintiff that, up to that point, the facts are not disputed, but that, as to how the accident occurred, there is a conflict in the testimony. The witnesses to the accident for the plaintiff were the driver of the automobile, the plaintiff and three street car passengers.

The question here involved is whether the defendants were guilty of negligence in the operation of their street car at the time and place where the collision between the street car and the automobile in which plaintiff was riding took place. At or about the place where the accident occurred, the street car tracks are level with the street, Damen Avenue being a north and south street, and the street car being at the intersection of 14th Street for the purpose of making an east turn, the motorman stopped his car at the north line of the intersection in order that a change in the switch might be

The automobile was there, while the license was in the name of their mother. At that time a friend of Edward Lator, and probably, accompanied him. After taking his sister to the dance, they passed by the home of plaintiff and invited him for a ride. The three of them drove around in the neighborhood all evening and for some time were in Central Park. Edward Lator and Jane Prosser sat in the front of the automobile, and plaintiff sat in the back seat all of the time, Edward Lator driving the automobile. At 11:45 o'clock, they started driving towards the dance hall, which was at Madison Street and Damen Avenue, to pick up Lator's sister. They drove north on Damen Avenue from First Street and from 17th Street they drove under the viaduct north towards 14th Street, driving on the west side of Damen Avenue, with the right wheel of the automobile slightly over the extreme west rail of the northbound tracks. There was no other traffic there, and the entire three blocks under the viaduct, as well as the intersection of Damen Avenue and 14th Street, were well lighted, and the street was dry. The lights in the street car as well as in the headlights of the automobile were on at the time of the accident. It is suggested by the plaintiff that, up to that point, the facts are not disputed, but that, as to how the accident occurred, there is a conflict in the testimony. The witnesses to the accident for the plaintiff were the driver of the automobile, the plaintiff and three street car passengers.

The question here involved is whether the defendants were guilty of negligence in the operation of their street car at the time and place where the collision between the street car and the automobile in which plaintiff was riding took place. At or about the place where the accident occurred, the street car tracks are level with the street, Damen Avenue being a north and south street, and the street car being at the intersection of 14th Street for the purpose of making an east turn, the motorcar stopped his car at the north line of the intersection in order that a change in the switch should be

made to proceed in making a left turn and had to wait for the signal of the conductor before making the left turn. There is something to the suggestion offered by the plaintiff that the driver of the automobile had no means of knowing how soon or how fast the street car would make the left turn or whether it would make the turn at all, since it does not appear that he even knew it was a 14th Street car. The driver was not required under the law to stop and wait until the motorman decided what he would do, and besides, under the law, the driver of the automobile was required to watch for traffic from his right. It is the rule of the road and the law, as well as the practical requirement for safety, that a vehicle intending to make a left turn should permit a vehicle approaching from the right or from the opposite direction to pass unmolested.

When the motorman started the street car on the curve, the street car was 32 feet North and at least 11 feet West of the place of the collision, and according to the testimony of the motorman, the front end of the street car extends 10 feet beyond the wheels of the street car and that when the wheels hit the switch the front end of the street car swings sharply. There is evidence that the time necessary for the street car to swing over from its straight southerly direction to the point of the collision was just a matter of seconds. As to whether there was a warning by the motorman, that is a question of fact for the jury to pass upon. Without such a warning the driver of the automobile had no means of judging the motorman's actions and had a right to assume that the street car would wait and let him pass. The facts regarding the approach of the automobile to the point of the intersection where the collision occurred seems to be that the automobile was driven from under the viaduct at a speed of at least 25 miles per hour. There is evidence that the driver took his foot off the gas when he was approaching 14th Street, and if we consider the physical lay of the street level, it must be noticed that the automobile was traveling upgrade. It is urged with some force, therefore, that when he took his foot off the gas the speed of the automobile

made to proceed in making a left turn and had to wait for the signal of the conductor before making the left turn. There is no question as to the suggestion offered by the witness that the driver of the automobile had no means of knowing how soon or how late the street car would make the left turn or whether it would make the turn at all, since it does not appear that he even knew it was a left street car. The driver was not required under the law to stop and wait until the motorman decided what he would do, and besides, under the law, the driver of the automobile was required to watch for traffic from his right. It is the rule of the road and the law, as well as the practical treatment for safety, that a vehicle intending to make a left turn should permit a vehicle approaching from the right to pass the vehicle in question to pass unimpeded.

When the motorman started the street car on the curve, the street car was 32 feet north and at least 11 feet east of the place of the collision, and according to the testimony of the motorman, the front end of the street car extends 10 feet beyond the wheels of the street car and that when the wheels hit the switch the front end of the street car swings sharply. There is evidence that the time necessary for the street car to swing over from the straight southerly direction to the point of the collision was just a matter of seconds. As to whether there was a warning by the motorman, that is a question of fact for the jury to pass upon. Without such a warning the driver of the automobile had no means of judging the motorman's actions and had a right to assume that the street car would wait and let him pass. The facts regarding the approach of the automobile to the point of the intersection where the collision occurred seem to be that the automobile was driven from under the viaduct at a point of 10 feet 25 miles per hour. There is evidence that the driver took his foot off the gas when he was approaching 14th Street, and it is considered the physical lay of the street level, it must be noticed that the automobile was traveling upwards. It is urged with some force, therefore, that when he took his foot off the gas the speed of the automobile

must have decreased so that it then traveled at a rate of speed considerably less than 25 miles per hour; that when he reached the center of the street and discovered the street car almost on top of him, he then not only stepped on the gas to make a turn, but at the same time made a turn to his right to avoid the accident.

Defendants contend that the street car did not get beyond the northbound track of Damen Avenue at any time. There is testimony of a police officer that the street car was standing on 14th Street, the left end over the east rail on the north bound Damen Avenue line, That is where the accident seems to have occurred. It is further urged by the defendants, however, that it was physically impossible for the motorman to stop the 26 or 27 ton street car instantaneously when he saw the automobile. Plaintiff submits that perhaps this contention is true, but that according to the testimony of the motorman he did exactly what counsel for defendants contend was a physical impossibility; that the motorman testified that when he slapped on the brakes on the street car, it did not continue to go, it stood still, it came to a complete stop; and that this shows his testimony to be entitled to little credence.

The point here is as to whether or not the motorman failed to keep a proper look out. There is evidence in the record which showed that he heard and saw the automobile at the same time, and defendants contend, therefore, that the purpose of a lookout was accomplished. Plaintiff admits that the motorman heard and saw the automobile, but contends that that did not accomplish the purpose of a lookout, and further contends that on the contrary that is proof of his negligence, since it was too late to prevent the accident. Failure to keep a proper lookout is negligence as a matter of law. Crow Name Plate & Mfg. Co. v. Danmerich, 279 Ill. App. 103. There is a suggestion and perhaps there is some force to the fact that there was some evidence that the gong on the street car was sounded and that there was testimony of other witnesses who did not hear the gong sounded,

must have proceeded as that it then traveled at a rate of speed considerably less than 15 miles per hour; that when he reached the center of the street and discovered the street car almost on top of him, he then not only stepped on the gas to make a turn, but at the same time made a turn to his right to avoid the accident.

Plaintiff contends that the street car did not get beyond the northbound track of Bowen Avenue at any time. There is testimony of a police officer that the street car was standing on 14th Street, the left end over the east rail on the north bound Bowen Avenue line. That is where the accident seems to have occurred. It is further urged by the defendant, however, that it was physically impossible for the motorist to stop the 26 or 27 ton street car instantaneously when he saw the automobile. Plaintiff submits that perhaps this contention is true, but that according to the testimony of the motorist he did exactly what counsel for defendant contends was a physical impossibility; that the motorist testified that when he stepped on the brakes on the street car, it did not continue to go, it stood still. It came to a complete stop; and that this shows his testimony to be entitled to little credence.

The point here is as to whether or not the motorist failed to keep a proper lookout. There is evidence in the record which showed that he heard and saw the automobile at the same time, and defendant contends, therefore, that the purpose of a lookout was accomplished. Plaintiff admits that the motorist heard and saw the automobile, but contends that that did not accomplish the purpose of a lookout, and further contends that on the contrary that is proof of his negligence, since it was too late to prevent the accident. Plaintiff to keep a proper lookout is negligence as a matter of law. Plata & Mfg. Co. v. Hammerstein, 273 Ill. App. 102. There is a suggestion and perhaps there is some force to the fact that there was some evidence that the car on the street car was rounded and that there was testimony of other witnesses who did not hear the car rounded,

and that such negative testimony did not tend to prove the allegation of negligence in that regard. However, in the first place, the only affirmative testimony that the gong was sounded was that of the motorman, and secondly, the driver of the automobile testified that there was no gong or bell sounded at any time. It was a question for the jury to determine whether or not a gong or bell was sounded as the motorman started to make the turn into 14th Street.

When we come to consider the facts, the question here is as to whether due care was exercised by plaintiff in the operation of the automobile in which the plaintiff was seated at the time of the accident.

The further fact that was considered, no doubt, by the jury was the fact that when the street car collided with the automobile there was such force that some of the passengers were knocked off their seats and that the conductor was almost knocked off the rear platform. The argument, however, of the defendants is that the evidence tends to show that the driver of the automobile was guilty of negligence, but the facts that are urged are for a jury to pass upon. The question here is was there sufficient evidence to justify the court in submitting the issues to a jury. The general rule applicable is that where, from all of the evidence in favor of the plaintiff together with all legitimate inferences therefrom, the jury may reasonably find for the plaintiff, it is error to enter a judgment for the defendants notwithstanding the verdict of the jury. The plaintiff under the law must exercise due care for his own safety, but, under the cases cited, it is not negligence per se to attempt to cross a street car track at a street intersection in front of an approaching street car. Whether attempting to cross a street car track at a street intersection ahead of an approaching street car constitutes negligence is a question of fact for the jury. (Fisher v. Chicago City Ry. Co., 114 Ill. App.217; Chicago Union Trac. Co. v. Jacobson, 217 Ill. 404; Chicago City Ry. Co. v. Sandusky, 198 Ill. 400; Loftus

v. Chicago Ry. Co., 293 Ill. 475.

The judgment order entered on July 11, 1940, by Judge William J. Wimbuscus, which is the subject of this controversy, states that this cause came on to be heard upon the motion of the plaintiff for an additor, and for a new trial, and the motion of the defendants for a judgment notwithstanding the verdict, which motions were theretofore filed in the cause, and that the court having heard the argument of counsel for and against said motions, it is hereby ordered; (1) that the plaintiff's motion for an additor be, and the same is hereby overruled and denied; (2) that the plaintiff's motion for a new trial be, and the same is hereby overruled and denied; (3) that the defendants' motion for a judgment notwithstanding the verdict, be, and the same is hereby allowed, and that a judgment finding the defendants not guilty, notwithstanding the verdict, be, and the same is hereby rendered and entered; and (4) that the judgment heretofore entered on the verdict, in the sum of \$5,000.00 in favor of the plaintiff be, and the same is hereby vacated. It is to be noted from this judgment order that the only subject matter that is really before this court for discussion is that part of the order allowing the defendants' motion for judgment notwithstanding the verdict, and that in substance will be the subject of our discussion. The statute (Par. 259.22, Chap. 110, Ill. Rev. Stat., 1939) provides as follows concerning the entry of judgment notwithstanding the verdict; "The power of the Court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence in the case, it would have been the duty of the Court to direct a verdict without submitting the case to the jury."

From the facts as we have found and considered them, we reach the conclusion that the court erred in entering this judgment order notwithstanding the verdict for the reason that there was evidence in the record from which, standing alone, the jury might, without acting unreasonably in the eyes of the law, find the material averments of the complaint to be sustained. A motion for a directed

v. Whitaker, Inc., 225 Ill. 475.

The judgment order entered on July 11, 1940, by Judge William J. Simons, which is the subject of this controversy, states that this cause came on to be heard upon the motion of the plaintiff for an additor, and for a new trial, and the motion of the defendant for a judgment notwithstanding the verdict, which motions were theretofore filed in the cause, and that the court having heard the argument of counsel for and against said motions, it is hereby ordered: (1) that the plaintiff's motion for an additor be, and the same is hereby overruled and denied; (2) that the plaintiff's motion for a new trial be, and the same is hereby overruled and denied; (3) that the defendant's motion for a judgment notwithstanding the verdict be, and the same is hereby allowed, and that a judgment finding the defendant not guilty, notwithstanding the verdict, be, and the same is hereby rendered and entered; and (4) that the judgment heretofore entered on the verdict, in the sum of \$6,000.00 in favor of the plaintiff be, and the same is hereby vacated. It is so ordered from this judgment order that the only subject matter that is truly before this court for discussion is that part of the order allowing the defendant's motion for judgment notwithstanding the verdict, and that in substance will be the subject of our discussion. The statute (Par. 250.22, Chap. 110, Ill. Rev. Stat., 1939) provides as follows: "In any case where, under the evidence in the case, it would have been the duty of the court to direct a verdict without awaiting the case to the jury."

From the facts as we have found and considered them, we reach the conclusion that the court erred in entering this judgment order notwithstanding the verdict for the reason that there was evidence in the record from which, standing alone, the jury might, without acting unreasonably in the eyes of the law, find the defendant

verdict under such circumstances is properly denied. The court in passing upon the defendants' motion for judgment notwithstanding the verdict is limited to facts appearing in evidence and must consider them in the light most favorable to the plaintiff. In considering this question the appellate court cannot weigh the evidence and will only determine whether the evidence tends to sustain the pleadings, and it is without jurisdiction upon defendants' motion to weigh the evidence and to determine whether the verdict of the jury is against the manifest weight of the evidence. We have considered the facts and we are of the opinion that the evidence warranted the jury in finding the defendants guilty of the acts charged in the complaint. This conclusion, of course, is fortified by the fact that plaintiff's motion for new trial was denied, there having been entered on the verdict of the jury a judgment in favor of the plaintiff.

No motion other than for judgment notwithstanding the verdict was made by defendants. They made no motion for a new trial, and the issue here, therefore, depends upon their motion for judgment notwithstanding the verdict of the jury. Under the facts and conditions as they appear in this record, we are of the opinion that the court was in error in allowing defendants' motion, and such judgment order notwithstanding the verdict will be reversed.

Under the circumstances, the order of the court will be that the judgment order of July 11, 1940, vacating the judgment on the verdict in favor of plaintiff and entering judgment notwithstanding the verdict in favor of defendant, will be reversed. So, we only have before us here now as matter for consideration the verdict of the jury for the plaintiff for the sum of \$5,000.00. For the reasons stated in the opinion, a judgment in favor of plaintiff will be entered here for this amount together with interest at the rate of 5% per annum from the date of the verdict, May 29, 1940, (Chap. 74, sec.

verdict under such circumstances is properly upheld. The court in
 pointing out the defendant's action for judgment notwithstanding
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 them in the light most favorable to the plaintiff. In considering
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 we are of the opinion that the evidence warranted the jury in finding
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 the jury for the plaintiff for the sum of \$5,000.00. For the reasons
 stated in the opinion, a judgment in favor of plaintiff will be
 entered here for this amount together with interest at the rate of 5%
 per annum from the date of the verdict, May 20, 1940, (Comp. Vol. 200,

3, Ill. Rev. Stat., 1939; Reitz v. Yellow Cab Co., 248 Ill. App. 287).

JUDGMENT FOR THE DEFENDANTS NOTWITHSTANDING
THE VERDICT IS REVERSED: JUDGMENT ON THE
VERDICT IN FAVOR OF PLAINTIFF ENTERED HERE
FOR \$5,000.00, TOGETHER WITH INTEREST AT
5% PER ANNUM FROM DATE OF VERDICT.

DENIS E. SULLIVAN, and BURKE, JJ. CONCUR.

3, III. Rev. Stat., 1930; Yellin v. Yellin, 1930, 3, III. Rev. Stat., 1930.

JUDGMENT FOR THE INTEREST ON THE
THE VERDICT IS REVERSED: JUDGMENT IN THE
VERDICT IS IN FAVOR OF PLAINTIFFS AND THE
FOR \$5,000.00, TOGETHER WITH COSTS AT
AS THE APPEAL FROM DATE OF VERDICT.

DEMIS E. SULLIVAN, and others, vs. J. J. GREGG.

41622

EARLE G. KRUMHINE, doing business as
E. G. KRUMHINE & COMPANY,

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

WILEUR E. HOWETT COMPANY, corporation,
and WILEUR E. HOWETT
Appellants.

311 I.A. 243

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is an action by the plaintiff to recover commissions as an agent, on industrial loans made by defendants, alleged to be due under contracts entered into between plaintiff and defendants. Upon the trial of the case and the issues, judgment was entered for the plaintiff in the sum of \$495.00, from which judgment defendants appeal. No point is raised on the pleadings.

Under plaintiff's theory that applies, it is suggested that plaintiff referred to the defendants two industrial loans, one known as the O'Shea loan and the other as the Vaughan & Bushnell Manufacturing Company loan. In the case of the Vaughan & Bushnell Manufacturing Company loan, it is the plaintiff's position that an agreement was entered into with the defendants whereunder the defendants were obligated to pay to plaintiff a one per cent commission on a first mortgage loan consummated on certain vacant improved industrial property at the southwest corner of Hoyne and Carroll Avenues in Chicago, Illinois; that such loan was consummated by the defendants in the sum of \$27,000 and that there is therefore due and owing plaintiff on said loan the sum of \$270.00; and in the case of the O'Shea loan it is the plaintiff's position that an agreement was entered into with defendants whereunder defendants agreed to pay to plaintiff a two per cent commission on a \$15,000 loan, or the sum of \$300, when said loan was consummated; that the loan was consummated; that the defendants paid \$75.00 on account of said commission of \$300.00 leaving a balance of \$225.00 due and owing from defendants to the plaintiff.

WILLIAM H. HARRIS, Plaintiff,
vs.
J. H. HARRIS & SONS, Defendants.

WILLIAM H. HARRIS, Plaintiff,
vs.
J. H. HARRIS & SONS, Defendants.

THE JUSTICE SHALL GRANT THE WRIT OF HABEAS CORPUS.

This is an action by the Plaintiff to recover damages as an agent, on industrial loans made by defendant, alleged to be due under contracts entered into between Plaintiff and defendant. Upon the trial of the case and the issues, judgment was entered for the Plaintiff in the sum of \$100.00, from which judgment defendant appeals. No point is raised on the pleading.

Under Plaintiff's theory that applied, it is suggested that Plaintiff referred to the defendants two industrial loans, one known as the "Blue Loan" and the other as the "Vanderbilt Industrial Company Loan". In the case of the Vanderbilt Industrial Company Loan, it is the Plaintiff's position that an agreement was entered into with the defendants whereunder the defendants were obligated to pay to Plaintiff a one per cent commission on a first mortgage loan consummated on certain vacant improved industrial property at the southwest corner of Hayne and Carroll streets in Chicago, Illinois; that such loan was consummated by the defendants in the sum of \$27,000 and that there is therefore due and owing Plaintiff on said loan the sum of \$270.00; and in the case of the "Blue Loan" it is the Plaintiff's position that an agreement was entered into with defendant whereunder defendant agreed to pay to Plaintiff a two per cent commission on a \$10,000 loan, of the sum of \$200, when said loan was consummated; that the loan was consummated; that the defendants paid \$20.00 on account of said commission of \$200.00 leaving a balance of \$180.00 due and owing from defendant to the Plaintiff.

The answer of defendants to plaintiff's theory is that:

First; In the case of the O'Shea loan, that a bona fide dispute existed between the defendants and the plaintiff as to the amount of commission to be paid to plaintiff by the defendant corporation; that the defendant corporation sent to plaintiff a check for \$75.00 "in full" of the commission due; that the plaintiff accepted the check and in so doing accepted it subject to the condition of full payment, a condition which was not waived by the defendants, and therefore the plaintiff is barred from recovering any further sum alleged to be due; Second, That in the case of the Vaughan & Bushnell Manufacturing Company loan, the defendants did not agree to pay to plaintiff any commission on the loan made by the defendant corporation; Third, That all of the dealings in connection with the two loans were between the plaintiff and the defendant corporation and there is nothing in the record to justify the entry of a finding and judgment against Wilbur E. Howett, individually.

The plaintiff contends with respect to the O'Shea loan that it is well settled that where a claim or demand is liquidated, and not in dispute, and is presently due or overdue, the payment by the debtor, and acceptance by the creditor, at the place where payment of the debt is proper to be made, of a part only of the debt, or any amount of money less than the whole amount which is due, affords no consideration for an agreement by the creditor to discharge the unpaid residue or balance of the debt. The defendants concede the testimony with respect to the facts that on April 14, 1939, plaintiff referred the so-called O'Shea mortgage loan of \$15,000 to defendants and furnished certain data in connection therewith, and that the defendants were paid a gross commission of 7%, or \$1,050.00. The record failed, however, to disclose a dispute as to amounts of the commission to be paid to the plaintiff, except that the affidavit of defense and the testimony of Wilbur E. Howett, denies the agreement to pay the plaintiff a commission of 2%. The testimony of Roland Lueder that Mr. Howett agreed to pay plaintiff a 2% commission is corroborated

The answer of defendant to plaintiff's answer is that:
First; In the case of the 'Great Loan, that a Good Title defense
existed between the defendant and the plaintiff as to the amount of
commission to be paid to plaintiff by the defendant corporation; that
the defendant corporation went to plaintiff a check for \$10,000.00
of the commission due; that the plaintiff accepted the check and in
so doing accepted it subject to the condition of full payment, and
condition which was not waived by the defendant, and therefore the
plaintiff is barred from recovering any further and alleged to be due;
Second, that in the case of the 'Lumber & Lumber' corporation
Company loan, the defendant did not agree to pay to plaintiff any
commission on the loan made by the defendant corporation; that,
that all of the dealings in connection with the two loans were between
the plaintiff and the defendant corporation and there is nothing in
the record to justify the entry of a finding and judgment against
Alfred E. Hewitt, individually.

The plaintiff contends with respect to the 'Great Loan
that it is well settled that where a claim or demand is liquidated,
and not in dispute, and is presently due or overdue, the payment of
the debt, and acceptance by the creditor, at the time when payment
of the debt is proper to be made, of a part only of the debt, or any
amount of money less than the whole amount which is due, effects a
consideration for an agreement by the creditor to discharge the whole
residue or balance of the debt. The defendant contends the plaintiff
with respect to the facts that on April 14, 1906, at Detroit, Michigan
the so-called 'Great mortgage loan of \$10,000 to defendant and
furnished certain data in connection therewith, and that the defendant
were paid a gross commission of \$2,000.00. The second claim,
however, to discharge a demand is to require of the commission to be
paid to the plaintiff, except that the plaintiff is allowed and has
testimony of Alfred E. Hewitt, denying the agreement to pay the
plaintiff a commission of \$2,000. The testimony of Alfred E. Hewitt that
Mr. Hewitt agreed to pay plaintiff a \$2 commission is controverted

by the plaintiff, Mr. Edmund F. O'Shea, and Joseph W. Bobbs. An examination of the correspondence between the parties does indicate that there was a dispute as to the commission. Immediately before institution of the instant suit the defendants wrote the plaintiff on February 25, 1940, offering an excuse as to why the full commission had not been paid. To this letter there was attached a check for \$75.00. To this communication the plaintiff replied on March 8, 1940, demanding the balance of commissions amounting to \$225.00 as well as \$270.00 on the other loan which is also the subject of this litigation.

From the statement of facts it appears that the plaintiff and defendant corporation, both Chicago concerns, were at the time of the occurrence of the matters involved in this suit engaged in similar lines of business - that of mortgage bankers. The defendant corporation was engaged in making first mortgage loans to industrial companies. The plaintiff was engaged in the real estate and mortgage business. It appears that the parties to this suit had known each other for some time and had had business dealings with each other for approximately fifteen or twenty years. The subject matter of this suit has to do with two separate and distinct transactions, the first being referred to as the "O'Shea loan" and the second as the "Vaughan & Bushnell loan".

The contention of the defendants is that where a check is offered in full satisfaction of a disputed demand, and the creditor accepts it, such acceptance constitutes satisfaction, although the creditor protests at the time that the amount received is not all that is due or that he does not accept it in full satisfaction. It appears that on or about April 14, 1939, plaintiff referred to the defendant corporation for consideration a first mortgage loan in the sum of \$15,000 on property of the O'Shea Knitting Mills at 2701 N. Pulaski Road, Chicago. The property was inspected by defendant corporation on April 17, 1939, to ascertain whether a first mortgage loan could be made on the property, and after a substantial amount of work, as outlined in a letter of the defendant corporation to plaintiff dated

by the Plaintiff, Mr. Edward J. Walsh, and Joseph W. Bower, in
 examination of the correspondence between the parties and in
 that there was a mistake as to the commission. Immediately before
 investigation of the facts and the defendant wrote the Plaintiff
 on February 20, 1940, offering an account as to why the 1939 commission
 had not been paid. To this letter there was attached a check for
 \$78.00. To this communication the Plaintiff replied on March 8, 1940,
 demanding the balance of commission amounting to \$112.00 as well as
 \$250.00 on the other loan which is also the subject of this litigation.
 From the statement of facts it appears that the Plaintiff and
 defendant corporation, both Chicago concerns, were at the time of the
 occurrence of the estate involved in this suit engaged in similar
 of business - that of mortgage business. The defendant corporation
 was engaged in making first mortgage loans to industrial concerns.
 The Plaintiff was engaged in the real estate and mortgage business.
 appears that the parties to this suit had known each other for some
 time and had had business dealings with each other for approximately
 fifteen or twenty years. The subject matter of this suit was one
 with two separate and distinct transactions, the first being between
 to as the "O'Brien loan" and the second as the "Vaughan & Randall loan".
 The contention of the defendant is that there is check is
 offered in full satisfaction of a disputed demand, and the Plaintiff
 accepts it, such acceptance constitutes satisfaction, although the
 creditor protests at the time that the amount received is not all that
 is due or that he does not accept it in full satisfaction. It appears
 that on or about April 14, 1939, Plaintiff received from the defendant
 corporation for consideration a first mortgage loan to the sum of
 \$12,000 on property of the O'Brien Building, 1111 N. Dearborn
 Road, Chicago. The property was insured by defendant corporation
 on April 17, 1939, in accordance with a first mortgage loan made
 be made on the property, and after a substantial amount of work, as
 outlined in a letter of the defendant corporation to Plaintiff dated

February 26, 1940, the O'Shea loan of \$15,000 was made by the defendant corporation in the month of January, 1940. There is evidence that the defendant corporation was paid on the loan so made a gross commission of 7% or \$1,050.00. Defendants submit that it is clearly established by the evidence that a dispute existed between the plaintiff and the defendant corporation with respect to the amount of the commission to be paid to the plaintiff by the defendant corporation on this loan. The defendants suggest that the ultimate fact that such a dispute or controversy existed is all that is necessary under the law to dispose of the matter when considered with the further admitted fact of payment of \$75.00 made by the defendant corporation to the plaintiff, which indicated that there was a question as to the amount of the commission due to plaintiff. There is evidence in this record that, regarding the claimed commission of 2%, that Mr. Bobka came to the office of Mr. Howett and told him that he expected no remuneration from the loan - as suggested by the plaintiff - because he was a personal friend of Mr. O'Shea, and this is in accord with Mr. Bobka's cross examination. From the testimony of Mr. Howett, it appears that when the defendant corporation decided that it would consider the O'Shea loan the corporation wrote a letter dated April 18, 1939, to the plaintiff company asking plaintiff to advise by letter what commission it expected to receive from the loan; that the plaintiff did not reply by letter but that a few days after April 18, 1939, Mr. Lueder of the plaintiff company phoned Mr. Howett and said he wanted a one-half of one per cent commission on whatever loan was made. The defendant corporation did not know at that time what loan would be made, and during that conversation with Mr. Lueder, Mr. Howett made a notation on the O'Shea office file, as follows: "One-half per cent to Lueder, - 4/19/'39".

Subsequently, on February 26, 1940, the defendant corporation mailed a letter to Mr. Lueder which read in part as follows;

February 26, 1940, the O'Brien loan of \$1,000 was made by the defendant corporation in the month of January, 1940. There is evidence that the defendant corporation was told on the loan to make a commission of 7% or \$1,000.00. Defendants submit that it is clearly established by the evidence that a dispute existed between the plaintiff and the defendant corporation with respect to the amount of the commission to be paid to the plaintiff by the defendant corporation on this loan. The defendants suggest that the dispute was that such a dispute or controversy existed in all that is necessary under the law to dispose of the matter when considered with the further admitted fact of payment of \$75.00 made by the defendant corporation to the plaintiff, which indicated that there was a question as to the amount of the commission due to plaintiff. There is evidence in this record that, regarding the alleged commission of 7%, that Mr. Boker came to the office of Mr. Howett and told him that he expected no remuneration from the loan - as suggested by the plaintiff - because he was a personal friend of Mr. O'Brien, and this is in accord with Mr. Boker's cross examination. From the testimony of Mr. Howett, it appears that when the defendant corporation decided that it would consider the O'Brien loan the corporation wrote a letter dated April 1, 1939, to the plaintiff company asking plaintiff to advise by letter what commission it expected to receive from the loan; that the plaintiff did not reply by letter but that a few days after April 1, 1939, Mr. Lueder of the plaintiff company phoned Mr. Howett and said he wanted a one-half of one per cent commission on whatever loan was made. The defendant corporation did not know at that time what loan would be made, and during that conversation with Mr. Lueder, Mr. Howett made a notation on the O'Brien office file, as follows: "One-half per cent to Lueder, - 4/18/1939". Subsequently, on February 26, 1940, the defendant corporation mailed a letter to Mr. Lueder which read in part as follows:

"We attach hereto, our check payable to the order of E. G. Krumrine & Co., in the sum of \$75.00, covering the commission in full as agreed on the \$15,000.00 first mortgage loan, which we negotiated for Edmund F. O'Shea, on the property located at 2701-09 N. Pulaski Road, Chicago, Illinois."

This letter was received by the plaintiff and Mr. Lueder had the check certified and deposited it. Plaintiff replied to defendant's letter by letter dated March 8, 1940, which was ten days later, which read in part;

"We acknowledge receipt of your check for \$75.00 in part payment of commission due us amounting to \$300.00 on the O'Shea loan, and demand forthwith the balance of \$225.00."

On March 14, 1940, defendant corporation replied to plaintiff's letter of March 8, 1940, denying that it owed anything further to plaintiff on the O'Shea loan and referred plaintiff to defendant's ^{letter} of February 26, 1940.

It would appear, therefore, from the facts in this record that the amount due from the defendant corporation to the plaintiff was unliquidated and a bona fide dispute existed between the parties in regard thereto; that payment was made by the defendant corporation to plaintiff by a check of \$75.00, accompanied by a letter to the plaintiff reciting that the check represented payment "in full as agreed"; that acceptance of the check by plaintiff was acknowledged as "part payment" with a demand for an alleged balance of \$225.00; and that the defendants did not waive the condition of full payment on which the check for \$75.00 was tendered to the plaintiff.

The attention of this court is called to the case of The Canton Union Coal Co. v. Parlin & Orendorff Co., 215 Ill. 244, where it appears that the plaintiff agreed to sell coal to defendant at certain stipulated prices. A controversy arose as to whether the plaintiff complied with the agreement and at its expiration the defendant sent to the plaintiff a statement of account and memoranda showing a balance due to plaintiff of \$470.67. A check for that amount was sent by the defendant to the plaintiff with a letter which read in part, as follows; "Enclosed please find our check on the First National Bank of Canton No. 19348, \$470.67 in full of account,

...in the sum of \$100.00, covering the commission in full as agreed on the 18, 1940, first mortgage loan, which was suggested for payment by the plaintiff, January 18, 1941, in Chicago, Illinois.

...by letter dated March 8, 1940, which was the only letter...

...the acknowledgment receipt of your check for \$100.00 in full...

...defendant corporation notified to plaintiff's letter...

...1940, saying that it was waiting further for plaintiff's letter...

...loan and returned plaintiff to defendant's letter...

...would appear, therefore, from the facts in this record...

...it due from the defendant corporation to the plaintiff...

...and a bona fide dispute existed between the parties...

...that payment was made by the defendant corporation...

...check of \$100.00, accompanied by a letter to the...

...that the check represented payment "in full as...

...reference of the check by plaintiff was acknowledged...

...with a demand for an alleged balance of \$100.00;

...indicates all not with the condition of full payment...

...or \$100.00 was tendered to the plaintiff...

The Court said in this case where there was no agreement at the time of the payment that the plaintiff was to be paid in full, the plaintiff is entitled to the full amount of the loan.

* * *. Please acknowledge receipt and oblige." The plaintiff received and deposited the check which was credited on its account as shown by plaintiff's books and then presented a statement to the defendant claiming a balance due which was denied by the defendant. Suit was brought for the balance claimed to be owing after the credit was given. The jury was instructed to find for the defendant and judgment was entered accordingly. This judgment was confirmed by the Appellate and Supreme Courts. The Supreme Court said;

"In such a case, payment of a part actually due or of a less sum than was claimed by plaintiff, if given and received in satisfaction of the demand, would amount to accord and satisfaction. * * * To constitute an accord and satisfaction it is necessary that the money or check, or whatever is offered, should be offered in full satisfaction of the demand, and should be offered in such a manner or accompanied by such acts or declarations as amount to a condition that if the party to whom it is offered takes it he does so in satisfaction of his demand. If the offer is made in such a manner, and it is accepted, the acceptance will satisfy the demand, although the creditor protests at the time that the amount received is not all that is due or that he does not accept it in full satisfaction of his claim. The creditor has no alternative except to accept what is offered with the condition upon which it is offered, or to refuse it; and if he accepts the acceptance includes the condition, notwithstanding any protest he may make to the contrary."

Continuing the court said:

"The check was the means of obtaining payment of the balance shown by the statement, and it was clearly offered as payment in full of the balance due. If the plaintiff, upon receipt of the check, had retained it and had not done or said anything further, there would be no dispute of the proposition that it was accepted in full payment and satisfaction of the demand. Plaintiff could not have understood that it was authorized by the letter to accept the check as a part payment and credit it on the account, leaving a balance due. If taken at all it was to be taken as it was offered, as a payment in full; and this would be true although the book-keeper went to the defendant's officer and protested that the check was not for the whole amount due. * * * If the plaintiff was not willing to accept the check as sent, in full of the account and acknowledge the receipt of it as requested, it ought to have returned it. The rule that required it to do so is neither harsh nor unjust, but it secured to the defendant the right to have its check received as offered, if received at all, unless there was a subsequent waiver of that condition."

Referring further to the rule as to what constitutes an accord and satisfaction, the court said;

"The question whether the amount accepted was less than the plaintiff was entitled to receive or would have recovered in case of suit is immaterial and does not in any way affect the rule."

The rules set forth in the Canton Coal Company case (*supra*) were adopted with approval by the court in the case of In Re Estate of James A. Cunningham v. Nathan Bond, Admr., 311 Ill. 311, and again in the case of The Economy Fuse and Manufacturing Co. v. The Standard Electric Manufacturing Company, 359 Ill. 504, where the court said:

"Conditional delivery of a check does not depend upon whether it shall be determined at the end of a lawsuit that a sufficient amount has or has not been tendered by the check, nor upon whether the payee therein later agrees that the check is for the correct amount. If it be for a sum differing from the claim of the payee, to which sum the payee must by accepting the check agree it shall be in full of his claim, the delivery is conditional until such time as he does so agree. A check for a sum less than the amount of a claim as to which there is a bona fide dispute, where such check is tendered in full payment of the amount due, cannot be accepted by the creditor without acquiescing in the condition upon which it is tendered."

It is apparent that the check for \$75.00 was for a sum less than plaintiff's claim. There seems to have been some dispute between the parties as to the amount due. This appears from the attempt of the plaintiff to accept the check "in part payment" and demand payment of the alleged balance. The letter of the defendant corporation accompanying the check, on the other hand, stated in plain language that the \$75.00 check was for the "commission in full * * *." That it was "in full" was the condition upon which it was tendered, and the plaintiff in having it certified and depositing it, by such actions acquiesced in the condition.

From the facts appearing in this record, the plaintiff was not entitled to a finding that the defendants were obliged to pay \$225.00 additional as a commission on the O'Shea loan and to have that sum included in the judgment in the present case. The plaintiff contends that such a partial payment does not, of itself, and in the absence of any new or additional consideration, constitute or effect an accord and satisfaction, but discharges the debt pro tanto only, and does not prevent the creditor from maintaining an action to recover the balance. With this contention as applied to the facts of this case, we cannot agree, since as we have indicated, the letter accompanying the check stated that the check was in full payment of

The rules set forth in the Restatement of the Law were adopted with approval by the court in the case of In re Estate of James A. Cunningham v. William Lord Adams, III, et al. in the case of The National Bank and Trust Company, et al. v. The Commercial Union Assurance Company, Ltd., 204 Ill. 504, where the court said:

"Conditional delivery of a check does not so and upon whether it shall be determined at the end of a lawsuit that sufficient amount has or has not been tendered by the check, nor upon whether the payee therein later agrees that the check is for the correct amount. It is for a time differing from the time of the payment, to which the payee must by accepting the check agree it shall be in full of his claim, the delivery is conditional until such time as he has so agreed. A check for a sum less than the amount of a claim is to which there is a bona fide dispute, where such check is tendered in full payment of the amount due, cannot be accepted by the creditor without constituting in the condition upon which it is tendered."

It is apparent that the check for \$75.00 was for a sum less than Plaintiff's claim. There seems to have been some dispute between the parties as to the amount due. This appears from the attempt of the Plaintiff to insert the check "in part payment" and demand payment of the alleged balance. The letter of the defendant corporation accompanying the check, on the other hand, stated in plain language that the \$75.00 check was for the "balance in full". That it was "in full" was the condition upon which it was tendered, and the Plaintiff in having it verified and depositing it, by such action acquiesced in the condition.

From the facts appearing in this record, the Plaintiff was not entitled to a finding that the defendant was obliged to pay \$25.00 additional on a condition on the other hand and to have that sum included in the judgment in the present case. The Plaintiff contends that such a verbal payment does not, of itself, and in the absence of any new or additional consideration, constitute or effect an accord and satisfaction, but discharges the debt once paid only, and does not prevent the creditor from obtaining an order to recover the balance. With this contention as applied to the facts of this case, we cannot agree, since as we have indicated, the letter accompanying the check stated that the check was in full payment of

the claim. Then too, the fact that plaintiff had the check certified and deposited to its account, further indicates that the plaintiff accepted the check upon the condition contained in defendant's letter. In view of the dispute concerning the amount due, we are of the opinion that the court was in error in allowing to plaintiff the balance of the claim that was alleged to be due as commissions on the O'Shea loan.

The facts as they appear in this record upon the Vaughn and Bushnell loan indicate that this company owned two pieces of improved real estate on Carroll Avenue in the City of Chicago - the main manufacturing building of the company, at 2114-38 Carroll Avenue, and a smaller two-story vacant building, at the southwest corner of Hoyne and Carroll Avenues. Both properties were encumbered, the larger property with a mortgage of \$45,000.00 and the vacant property with a mortgage of \$27,000.00. The Vaughn and Bushnell Company applied to plaintiff for a loan on its main plant some time prior to October 30, 1936, but plaintiff was unable to place the loan. The plaintiff contends that defendants misstate the material facts. The amendment to the Statement of Claim that was filed by plaintiff alleges that there was an agreement between the parties for a commission of 1% on the loan if consummated by the defendants. The plaintiff introduced testimony in support of that agreement. It is suggested by plaintiff that counsel for defendants is grossly in error when he states in his brief and argument that the commission on this loan received by the defendants was \$422.55, and states that the actual commission received by the Howetts was \$1,620.00 in addition to appraisal fees, out of which the plaintiff was to receive 1%, or \$270.00.

The court examined all the evidence offered by the parties and saw and heard the witnesses and testimony of both parties. In Israel v. Selman, 263 Ill. App. 351, this court held that "the finding of a trial court is entitled on review to the same weight as the

The check, then too, the fact that plaintiff had the check cashed and deposited to his account, further indicates that the plaintiff accepted the check upon the condition contained in defendant's letter. In view of the dispute concerning the amount due, we are of the opinion that the court was in error in allowing to plaintiff the balance of the claim that was alleged to be due as consideration on the above loan.

The facts as they appear in this record upon the Vaughn and Buchnell loan indicate that this company owned two pieces of improved real estate on Carroll Avenue in the City of Chicago - the main manufacturing building of the company, at 111-38 Carroll Avenue, and a smaller two-story vacant building, at the southwest corner of Hoyne and Carroll avenues. Both properties were encumbered, the latter property with a mortgage of \$85,000.00 and the vacant property with a mortgage of \$27,000.00. The Vaughn and Buchnell company applied to plaintiff for a loan on its main plant some time prior to October 30, 1935, but plaintiff was unable to place the loan. The plaintiff contends that defendant misstates the material facts. The amendment to the statement of claim that was filed by plaintiff alleges that there was an agreement between the parties for a loan of \$25,000 on the loan it was made by the defendant. The plaintiff introduced testimony in support of that agreement. It is suggested by plaintiff that counsel for defendant is guilty in error when he states in his brief and argument that the commission on this loan received by the defendant was \$425.00, and states that the actual commission received by the defendant was \$1,000.00 in addition to capital fees, out of which the plaintiff was to receive \$1,000.00.

The court examined all the evidence offered by the parties and saw and heard the witnesses and testimony of both parties. In Israel v. Israel, 233 Ill. App. 201, this court held that "the finding of a trial court is entitled on review to the same weight as the

verdict of a jury". Likewise, this court has announced in numerous cases that "judgment of the Municipal Court will not be set aside if substantial justice has been done", Finch v. Wisconsin Dairy Farm Co 137 Ill. App. 400. The total commissions received by the defendants in connection with the so-called Vaughn-Bushnell loan, exclusive of appraisal fees, was \$1,620.00, on which plaintiff claimed and proved an agreement to pay 1%, or \$270.00. Plaintiff suggests that this court has stated in numerous cases that "the findings of the court as to the facts of a case, where it is tried without a jury, are entitled to the same presumptions as the verdict of the jury". (citing cases).

The defendant contends that the finding and judgment of the trial court against Wilbur E. Howett individually is clearly erroneous, and suggests that Wilbur E. Howett individually had nothing to do with the various negotiations except in his capacity as president and agent of the defendant corporation. The plaintiff's own evidence, it is urged, established conclusively that all of its dealings were with the defendant corporation and that it looked solely to the defendant corporation for whatever commissions it claimed were owing. Plaintiff's Exhibits 1 and 1a are letters written by the defendant corporation and signed "Wilbur E. Howett Company - W. E. Howett, President." The plaintiff's exhibits 1 and 2 are letters written on the letterhead of defendant corporation, the letterhead being in part as follows: "Wilbur E. Howett Company, Corporation, - Industrial Mortgage Bankers". The language used in these letters refers to the writer in the third person and at no place is there an intimation that Mr. Howett is writing in his individual capacity. From the facts as they appear he was acting for his corporation and the plaintiff knew this to be the fact - as is born out by plaintiff's correspondence. Under date of March 8, 1940, the plaintiff addressed a letter to the defendant corporation. That letter was addressed, "Mr. Wilbur E. Howett, President, Wilbur

verdict of a jury. Likewise, this court has announced in numerous cases that "judgment of the judicial court will not be set aside if substantial justice has been done", Smith v. Alexander, 1917 Ill. App. 400. The total compensation received by the defendant in connection with the so-called Vantage-Bushnell loan, exclusive of copyright fees, was \$1,650.00, on which plaintiff claimed and proved an agreement to pay 1% or \$165.00. Plaintiff suggested that this court has stated in numerous cases that "the findings of the court as to the facts of a case, where it is tried without a jury, are entitled to the same presumption as the verdict of the jury". (citing cases).

The defendant contends that the finding and judgment in the trial court against William E. Hewett individually is clearly erroneous, and suggests that William E. Hewett individually had nothing to do with the various negotiations except to the extent as president and agent of the defendant corporation. The plaintiff's own evidence, it is urged, established conclusively that all of the dealings were with the defendant corporation and that it acted solely to the defendant corporation for whatever consideration is claimed were owing. Plaintiff's exhibit 1 and its letters written by the defendant corporation and signed "William E. Hewett, Company - E. E. Hewett, President". The plaintiff's exhibit 1 and 2 are letters written on the letterhead of defendant corporation, the letterhead being in part as follows: "William E. Hewett, Company, Corporation, - Industrial Mortgage Company". The language used in these letters refers to the writer in the third person and of no place is there an intimation that Mr. Hewett is writing in his individual capacity. From the facts as they appear in the record for his corporation and the plaintiff knew that in the year - 1940, the plaintiff advanced a loan to the defendant corporation. That letter was addressed, "Mr. William E. Hewett, President, William

E. Howett Company". The plaintiff's own attorneys in a written demand made upon the defendant corporation addressed their letter dated March 14, 1940, as follows: "Wilbur E. Howett Co. - Attention: Mr. Wilbur E. Howett, President." It appears from these letters which have been called to our attention, and the fact that the letters addressed to plaintiff were signed by the defendant Wilbur E. Howett as president of his company and from the language used, that he was acting only in behalf of the corporation. It does not appear from any other facts in evidence that he acted in any other capacity. The only reply which plaintiff makes to the contention in defendant's brief, that the judgment is erroneous as to Wilbur E. Howett individually, is that no objection or question was made in the trial court by Wilbur E. Howett that he, personally, was not a proper party defendant. Plaintiff contends that, therefore, this question being raised for the first time on appeal is untenable. Assuming, however, the suggestion as made by plaintiff, still the evidence offered does not tend to establish the individual liability of Wilbur E. Howett, and such being the case the court was, of course, in error when it entered judgment against him. The plaintiff was required to prove by a preponderance of evidence facts which would connect Mr. Howett with the transaction and make him individually liable. This not appearing, we are of the opinion that the court erred in entering judgment against Wilbur E. Howett individually.

The judgment as rendered by the court for the plaintiff and against the defendants for the sum of \$495.00 is reversed, and for the reasons stated in this opinion, judgment is entered by this court for the plaintiff and against the defendant, Wilbur E. Howett Company, a corporation, for the sum of Two Hundred and Seventy (\$270.00) Dollars.

JUDGMENT REVERSED AND JUDGMENT HERE FOR PLAINTIFF
FOR \$270.00.

DENIS E. SULLIVAN AND BURKE, JJ. CONCUR.

E. Hewett Company. The Plaintiff's own attorney in a written demand made upon the defendant corporation addressed to the latter dated March 14, 1940, as follows: "Alfred E. Hewett, Plaintiff: Mr. Alfred E. Hewett, President. It appears from these letters which have been called to my attention, and the fact that the letters addressed to Plaintiff were signed by the defendant alone, E. Hewett as President of his company and from the January 1940, that he was acting only in behalf of the corporation. It does not appear from any other facts in evidence that he acted in any other capacity. The only reply which Plaintiff made to the corporation is defendant's brief, that the judgment is erroneous as to value. Hewett individually, is that no objection or question was made in the trial court by Alfred E. Hewett that he, personally, was not a proper party defendant. Plaintiff contends that, therefore, any question being asked for the first time on appeal is untenable. Assuming, however, the suggestion as made by Plaintiff, still the evidence offered does not tend to establish the individual liability of Alfred E. Hewett, and much being the case the court was, of course, in error when it entered judgment against him. The Plaintiff was required to prove by a preponderance of evidence that which would connect Mr. Hewett with the transaction and make him individually liable. This not appearing, we are of the opinion that the court erred in entering judgment against Alfred E. Hewett individually. The judgment as rendered by the court for the Plaintiff and against the defendant for the sum of \$425.00 is reversed, and now the reasons stated in this opinion. Judgment is entered on this point for the Plaintiff and against the defendant, Alfred E. Hewett Company, a corporation, for the sum of two hundred and twenty-five (\$250.00) dollars and costs of \$25.00. Judgment with interest from date of entry of this judgment." JAMES E. SULLIVAN AND ROBERT W. JONES, Attorneys for Plaintiff.

41440

HARRIET KOWBEL,

v.

Petitioner,

PETITION FOR LEAVE

TO APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

GUY A. RICHARDSON and WALTER J. CUMMINGS,
as Receivers of Chicago Railways Company,
a corporation, and HARVEY B. FLEMING and
EDWARD E. BROWN, as Receivers of Chicago
City Railways Company, Calumet and South
Chicago Railway Company, and the SOUTHERN
STREET RAILWAY COMPANY, a corporation;
doing business as the CHICAGO SURFACE LINES,

Respondents.

311 I.A. 244

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This cause comes before us on a petition for leave to appeal from an order entered in the Superior Court granting a new trial, wherein the verdict of a jury was returned after trial, finding the defendant guilty and assessing plaintiff's damages at \$3,000. On motion by defendant for a new trial, the verdict was set aside and a new trial granted. Petition for leave to appeal was filed in this court when the petition was granted and an answer of the defendant filed thereto.

At the outset we are met with a motion to dismiss the appeal because of noncompliance with the provisions of Rule 30 of the Supreme Court and Rule 20 of this court.

The authority for granting leave to appeal from an order granting a new trial and the limitations within which such authority may be exercised, is set forth in Section 77 of the Practice Act, as follows:

"An order granting a new trial shall be deemed to be a final order, but no appeal may be taken therefrom, except on leave granted by the reviewing court, or by a judge thereof in vacation, within thirty days after the entry of the order, on motion and notice to adverse parties."

In regulating the practice under section 77, it is provided in Rule 30 of the Supreme Court and in Rule 20 of the Appellate Court, as follows:

"Upon notice and motion, made within 30 days after the entry of the order granting the new trial, the reviewing court, or any judge thereof in vacation, may extend the time for filing the transcript of record and the abstract, and for the granting of leave to appeal."

It will be seen from a study of this rule that there is no provision for the granting of a further extension of time or for the filing of transcript and the abstract. The jurisdiction of the reviewing court to grant leave to appeal in such cases will expire at the end of 30 days after the entry of the order granting the new trial unless the court has, by order entered within such 30 days, extended such jurisdiction.

The case of Akehuret v. Summe, et al., 281 Ill. App. 554, concerned a petition for leave to appeal from an order granting a new trial. An extension of time had been granted within 30 days after the entry of the order and the petitioner sought a further extension on motion made after the expiration of such 30 days. This court therein said at pages 555, 556 and 559, respectively:

"The novel question presented by the motion is whether this court has jurisdiction within the extended period, but more than 30 days after the entry of the order granting a new trial, to allow a further extension of time for filing a record, abstracts and petition for leave to appeal.

* * * * *

This rule does not help plaintiff, for it is reasonably clear from a consideration of the rule in connection with the statute that a petition for leave to appeal from an order granting a new trial must be filed within 30 days from the entry of such order, or within such extended time as the reviewing court may allow during said 30 days. Cases will undoubtedly arise in which an extension may become necessary, and the rule quoted makes ample provision therefor, with the limitation, however, that the extension must be granted within 30 days from the entry of the order. It does not specify or contemplate that a further extension may be allowed within the extended period, and after the 30 days following the entry of the order granting the new trial have expired. If the record in a case be voluminous and there are questions involved which require a lengthy extension of time for preparing the transcript of record, abstracts and petition, the litigants, who are presumed to be familiar with all the circumstances of the case, may request an extension that will give them ample time and opportunity to prepare their record and petition, but the motion to extend the time must obviously be made within the 30 days following the entry of the judgment as provided by Rule 20."

* * * * *

"Upon notice and motion, made within 30 days after the entry of the order granting the new trial, the reviewing court, or any judge thereof in vacation, may extend the time for filing the transcript of record and the abstract, and for the filing of leave to appeal."

It will be seen from a study of this rule that there is no provision for the granting of a further extension of time or for the filing of transcript and the abstract. The jurisdiction of the reviewing court to grant leave to appeal in such cases will expire at the end of 30 days after the entry of the order granting the new trial unless the court has, by order entered within such 30 days, extended such jurisdiction.

The case of Alford v. State, 281 Ill. App. 525,

concerned a petition for leave to appeal from an order granting a new trial. An extension of time had been granted within 30 days after the entry of the order and the petitioner sought a further extension on motion made after the expiration of such 30 days. The court therein said at pages 525, 526 and 529, respectively:

"The novel question presented by the motion is whether this court has jurisdiction within the extended period, but more than 30 days after the entry of the order granting a new trial, to allow a further extension of time for filing a record, abstract and petition for leave to appeal."

This rule does not help directly, for it is reasonably clear from a consideration of the rule in connection with the statute that a petition for leave to appeal from an order granting a new trial must be filed within 30 days from the entry of such order, or within such extended time as the reviewing court may allow further said 30 days. Cases will undoubtedly arise in which an extension may become necessary, and the rule quoted makes no provision therefor, with the limitation, however, that the extension must be granted within 30 days from the entry of the order. It does not specify or contemplate that a further extension may be allowed within the extended period, and after the 30 days following the entry of the order granting the new trial have expired. If the record in a case be voluminous and there are questions involving which require a lengthy extension of time for preparing the transcript of record, abstract and petition, the litigants, who are presumed to be familiar with all the circumstances of the case, may request an extension that will give them some time and opportunity to prepare their record and petition, but the motion to extend the time must obviously be made within the 30 days following the entry of the judgment or verdict by which the

The right to appeal from an order granting a new trial is a privilege not heretofore given litigants, and it was clearly the intent of the act, and the rules adopted supplementary thereto, that the right should be exercised promptly. This is evidenced by comparison of Rule 20 with Rule 9, which provides for extensions of time for filing records, abstracts and briefs in ordinary appeals, upon good cause shown, within the court's discretion. Under Rule 20, appeal from an order granting a new trial is treated separately and is similar to Rule 21 governing interlocutory appeals, in that it contemplates prompt action on the part of litigants. In conformity with these views, we hold that under the provisions of the act and rules of this court the extension must be granted within 30 days after entry of the order granting a new trial; after that the power to grant a further extension does not exist."

At the time the foregoing opinion was written, in order that there might be unanimity of action between the bar and this court, the opinion was specially concurred in by all the justices of this court and such concurrence read as follows:

"We concur in holding that under the provisions of the Civil Practice Act and the rules of this court any extension of time for the filing of records, abstracts and petition for appeal from an order granting a new trial must be granted within 30 days after entry of the order by the trial court; that the court has no power to grant a further extension after the expiration of such 30-day period."

In the instant case it appears that the order granting a new trial was entered in the Superior Court on July 1, 1940 and the period of 30 days thereafter expired on July 31, 1940. Prior to the expiration of such 30 days, petitioner filed in this court a short record and, by leave of court, a typewritten petition for leave to appeal. The short record filed consisted of placita, order granting new trial, praecipe for record, notice of filing praecipe for record and certificate of the clerk. It was not "a transcript of such portions of the record of the trial court as shall be necessary to present the question for review", as is described by Rule 20 of this court. No abstract was filed within 30 days as is required by Rule 20.

Prior to the expiration of such 30 days, on motion of petitioner, an order was entered in this court granting an extension of time for 60 days from July 31, 1940, to file a complete record, abstract and an additional and amended petition for leave to appeal.

The 60-day extension of time granted for the filing of

The right to amend from an order granting a new trial is a privilege not a retort given litigation, and it was clearly the intent of the act, and the rules adopted subsequently thereon, that the right should be exercised promptly. This is evidenced by comparison of rule 30 with rule 5, which provides for amendment of time for filing records, abstracts and bills in ordinary appeals, upon good cause shown, within the court's discretion. Under rule 30, appeal from an order granting a new trial is treated separately and is similar to rule 31 governing interlocutory appeals, in that it contemplates prompt action on the part of the appellate court. In conformity with these views, we hold that under the provisions of the act and rules of this court the extension must be granted within 30 days after entry of the order granting a new trial; after that the power to grant a further extension does not exist."

At the time the foregoing opinion was written, in order that there might be unanimity of action between the bar and this court, the opinion was respectfully concurred in by all the justices of this court and such concurrence read as follows:

"We concur in holding that under the provisions of the Civil Practice Act and the rules of this court any extension of time for the filing of records, abstracts and petition for appeal from an order granting a new trial must be granted within 30 days after entry of the order by the trial court; that the court has no power to grant a further extension after the expiration of each 30-day period."

In the instant case it appears that the order granting a new trial was entered in the Superior Court on July 1, 1940 and the period of 30 days thereafter expired on July 31, 1940. Before the expiration of such 30 days, petitioner filed in this court a short record and, by leave of court, a typewritten petition for leave to appeal. The short record filed consisted of abstract, order granting new trial, verbatim for record, notice of filing petition for record and certificate of the clerk. It was not a transcript of each portion of the record of the trial court as shall be necessary to present the question for review, as is required by rule 30 of this court. No abstract was filed within 30 days as is required by rule 30.

Prior to the expiration of such 30 days, on motion of petitioner, an order was entered in this court granting an extension of time for 30 days from July 31, 1940, to file a complete record, abstract and an additional and amended petition for leave to appeal. The 30-day extension of time granted for the filing of

a complete record, abstract or additional and amended petition for leave to appeal expired without such complete record, abstract or additional and amended petition for leave to appeal having been filed. Akehurst v. Summe, et al., 281 Ill. App. 554, et seq.

There were a succession of motions for further extensions and orders granting further extensions from time to time, all of which were made and entered more than 30 days after the entry of the order granting the new trial and when the power to grant such further extensions did not exist. Akehurst v. Summe, et al., supra.

This court being without power to issue such orders granting an extension of time, it necessarily follows that defendant's motion to dismiss the appeal of plaintiff should be granted.

For the reasons herein given the appeal of plaintiff is dismissed.

APPEAL DISMISSED.

HEBEL, J. AND BURKE, PJ. CONCUR.

a complete record, abstract or additional and amended petition for
leave to amend without such complete record, amended
or additional and amended petition for leave to amend having been
filed. Adams v. Adams, 21 Ill. App. 55, et seq.

There were a suggestion of motions for further extension
and orders granting further extensions from time to time, all of
which were made and entered more than 90 days after the entry of
the order granting the new trial and when the power to grant such
further extensions did not exist. Adams v. Adams, 21 Ill. App. 55.

This court being without power to issue such orders
granting an extension of time, it necessarily follows that defendant's
motion to dismiss the appeal of plaintiff should be granted.
For the reasons herein given the appeal of plaintiff is
dismissed.

APPEAL DISMISSED.

WHEEL, J. J. AND WHEEL, J. J. CONCUR.

41675

MOLLY ENCIMER, FRANK ENCIMER and
MARY ENCIMER,

Appellees,

v.

GRAND CARNIOLIAN SLOVENIAN CATHOLIC
UNION of the United States of
America,

Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

311 I.A. 244

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Molly Encimer brought an action against defendant seeking to recover \$1000 on a beneficial certificate issued by defendant to her husband, Martin Encimer, December 8, 1925, who died November 6, 1936. The defense interposed was that Martin Encimer was not a member of defendant at the time of his death, having been suspended October 29, 1936, for non-payment of dues. While the suit was pending the complaint, by leave of court, was amended by making Frank and Mary Encimer, parents of the deceased, additional parties plaintiff and later the widow, Molly Encimer, was dismissed out of the case. There was a jury trial, a verdict and judgment in plaintiffs' favor for \$1202.87, and defendant appeals.

The record discloses Martin Encimer was about 16 years of age when the certificate was issued to him; that he was required to pay 82 cents per month to remain in good standing; that almost all the time from the date the certificate was issued to the day of his death - a period of about 10 years and 10 months - he was in arrears in the payment of the amount required of him but the Local Lodge of which he was a member and which was located in South Chicago, paid defendant Grand Lodge, located at Joliet, promptly each month, the last payment being made for the month of September, 1936. From time to time Martin and his mother made payments on account to the Local Lodge for which credit was given.

John Likovich, secretary of the Local Lodge, testified he made a written report to the Grand Lodge about October 29, 1936, advising it that Martin was behind in his dues and the report showed

MOLLY ENLIMER, FRANK ENLIMER and
MARY ENLIMER, Appellees,

GRAND CATHOLIC PROTESTANT CATHOLIC
UNION of the United States of
America, Appellant.

APPEAL FROM
CIRCUIT COURT,
COON COUNTY.

3111A.244

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Molly Enlimer brought an action against defendant seeking to recover \$1000 on a beneficial certificate issued by defendant to her husband, Martin Enlimer, December 8, 1925, who died November 6, 1936. The defense interposed was that Martin Enlimer was not a member of defendant at the time of his death, having been suspended October 29, 1933, for non-payment of dues. While the suit was pending the complaint, by leave of court, was amended by making Frank and Mary Enlimer, parents of the deceased, additional parties plaintiff and later the widow, Molly Enlimer, was dismissed out of the case. There was a jury trial, a verdict and judgment in plaintiff's favor for \$1202.87, and defendant appeals.

The record discloses Martin Enlimer was about 16 years of age when the certificate was issued to him; that he was required to pay 82 cents per month to remain in good standing; that almost 11 years from the date the certificate was issued to the day of his death - a period of about 10 years and 10 months - he was in arrears in the payment of the amount required of him but the local lodge of which he was a member and which was located in South Chicago, paid defendant Grand Lodge, located at Joliet, promptly each month, the last payment being made for the month of September, 1936. From time to time Martin and his mother made payments on account to the local lodge for which credit was given.

John Lixovich, secretary of the local lodge, testified he made a written report to the Grand Lodge about October 29, 1936,

he was suspended October 29, 1936. The report was received by the home office November 2, 1936. The witness further testified, "I notified him [Martin] to come in for October but he did not come in," and he produced a postcard which was copied from memory as a copy of the one he had mailed to Martin, but upon objection the card was not admitted.

On the other side the deceased's sister Ann testified that the only card Martin received from the Local Lodge was one which notified him to attend a regular meeting of the Local Lodge November 1, 1936; that Martin was living with his parents and her at that time and was very ill. It further appears Martin died November 6, 1936, of meningitis after an illness of one month; that after his death the matter was taken up with the Local Lodge for payment; payment was refused on the ground that the deceased was not a member at the time of his death.

Counsel for defendant in his brief says "up to and including the month of September, 1936, the Lodge Secretary advanced Encimer's dues monthly, remitting same promptly each month to the Supreme Office. The Record does not show ^{that} these advancements were made through any understanding or arrangement between Encimer and the Secretary; neither does the Record show that the Secretary was authorized to use the Lodge funds for this purpose.

"There is no dispute in the evidence but that insofar as the Supreme Office records were concerned, Encimer's dues were, at all times, promptly paid. Not until the Lodge Report for the month of October, 1936, dated October 29th, 1936, was received at the Supreme Office, through the mail, did the Supreme Office records disclose Encimer to be delinquent. This Report carried him as suspended. His name did not appear as a member on the November, 1936, Report. The Record does not contain any evidence that the Supreme Office had any knowledge of the fact that the Lodge, or Lodge Secretary, was advancing Encimer's dues." Counsel contends that such payment by the Local Lodge to the Supreme Lodge "does not create a waiver or estop-

he was subpoenaed October 29, 1936. The report was received by the home office November 2, 1936. The witness further testified, "I notified him [Martin] to come in for October but he did not come in and he produced a postcard which was copied from memory as a copy of the one he had mailed to Martin, but upon objection the card was not admitted.

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Counsel for defendant in his brief says "up to and including the month of September, 1936, the lodge secretary advanced Encimer's dues monthly, remitting same promptly each month to the Supreme Office. The Record does not show ^{that} these advancements were made through any understanding or arrangement between Encimer and the Secretary; neither does the Record show that the Secretary was authorized to use the lodge funds for this purpose.

"There is no dispute in the evidence but that insofar as the Supreme Office records were concerned, Encimer's dues were, at all times, promptly paid. Not until the lodge report for the month of October, 1936, dated October 29th, 1936, was received at the Supreme Office, through the mail, did the Supreme Office records disclose Encimer to be delinquent. This report carried him as suspended. His name did not appear as a member on the November, 1936, Report. The Record does not contain any evidence that the Supreme Office had any knowledge of the fact that the lodge, or lodge secretary, was advancing Encimer's dues." Counsel contends that such payment by the local lodge to the Supreme lodge "does not create a waiver or estop-

pel which prevents forfeiture of a Certificate for non-payment of assessments" and that the court erred in not directing a verdict for defendant. Counsel says he has been unable to find any case passing upon this question in Illinois but a number of cases from other jurisdictions have sustained defendant's contention. We are unable to agree with this contention and think the matter has been passed upon by the Supreme court and by this court, contrary to counsel's contention. Conductors' Benefit Assn v. Tucker, 157 Ill. 194; Routa v. Royal League, 274 Ill. App. 152, and cases there cited, discussed and applied.

In the Tucker case the well-known rule of law was announced that unless a clear intention to declare a forfeiture is shown, such forfeiture would not be enforced; and that a mutual benefit society, such as the defendant in the instant case, may by its conduct and course of dealing, waive a forfeiture of membership incurred under its by-laws for non-payment of dues; and that whether there is a waiver is generally a question of fact for the jury.

It has also been held that where dues or assessments are paid by the Local Lodge to the Supreme Lodge, the Local Lodge is agent of the Supreme Lodge and the general rule in such case is "that the by-laws of a mutual benefit society, limiting the authority of its local organizations or officers in these respects [the by-laws which provided the Local Lodge had no authority to waive any requirements of the by-laws], are unavailing where such local body or officer has apparent authority." Routa v. Royal League, 274 Ill. App. 152. We are entirely satisfied with the holding of another division of this court in the Routa case. We are also of opinion that defendant, through its course of conduct, was estopped to declare a forfeiture without giving personal notice to the insured. Conductors' Benefit Assn. v. Tucker, 157 Ill. 201, where it was said: "Where, out of sixty-four payments made by the assured, sixty-three had been made after the time limited by the by-laws had expired, and no conditions were insisted upon for re-instatement, it

which prevents forfeiture of a certificate for non-payment of assessments" and that the court erred in not directing a verdict for defendant. Counsel says he has been unable to find any case passing upon this question in Illinois but a number of cases from other jurisdictions have sustained defendant's contention. We are unable to agree with this contention and think the matter has been passed upon by the Supreme court and by this court, contrary to counsel's contention. Condottieri Benefit Assn v. Tucker, 187 Ill. 184; Route v. Royal Leagues, 274 Ill. App. 152, and cases there cited, discussed and applied.

In the Tucker case the well-known rule of law was announced that unless a clear intention to declare a forfeiture is shown, such forfeiture would not be enforced; and that a mutual benefit society, such as the defendant in the instant case, may by its conduct and course of dealing, waive a forfeiture of membership incurred under its by-laws for non-payment of dues; and that whether there is a waiver is generally a question of fact for the jury.

It has also been held that where dues or assessments are paid by the local lodge to the Supreme lodge, the local lodge is agent of the Supreme lodge and the general rule in such case is "that the by-laws of a mutual benefit society, limiting the authority of its local organizations or officers in these respects [the by-laws which provided the local lodge had no authority to waive any requirements of the by-laws] are unavailing where such local body or officer has apparent authority." Route v. Royal Leagues, 274 Ill. App. 152. We are entirely satisfied with the holding of another division of this court in the Route case. We are also of opinion that defendant, through its course of conduct, was estopped to declare a forfeiture without giving personal notice to the insured. Condottieri Benefit Assn v. Tucker, 187 Ill. 201, where it was said: "Where, out of sixty-four payments made by the insured, sixty-three had been made after the time limited by the by-laws had expired, and no conditions were insisted upon for re-insurement, it

was held, that such a course of conduct of the company estopped it from insisting upon a forfeiture for non-payment within such time without giving personal notice, that thereafter prompt payment would be required." We think the notice claimed to have been given by defendant was wholly insufficient to forfeit Martin's membership for past defaults. But in any event, whether any notice was given was a question for the jury.

Complaint is also made that there is a fatal variance between the allegations of the complaint "and the evidence which amounts to a total lack of proof." In support of this it is said the complaint alleged compliance had been made with all of the provisions of the beneficial certificate while the proof showed no proof of death, as required, had been made. It is obvious that had proofs of death been made it would have been unavailing because defendant denied liability. On the trial and in this court defendant contended that Martin was suspended prior to his death. The law does not require the doing of a useless act. The allegation was unnecessary. The point now made was not mentioned on the trial and cannot be urged here.

Complaint is made to the giving of instructions Nos. 2, 4 and 11 at plaintiffs' request. By instruction No. 2 the jury were instructed that the Local Lodge was the agent of the Grand or Superior Lodge and from what we have heretofore said, the instruction was proper. By instruction No. 4 the jury were told that if defendant, by its acts and conduct had waived prompt payment it could not, without giving reasonable notice, insist upon prompt payment and declare a forfeiture. This contention is also disposed of adversely to defendant's contention for the reasons hereinbefore stated. Instruction No. 11 told the jury that if they found the issues for plaintiffs the measure of damages was \$1000, the face of the certificate with interest to the date of the death of the insured and it is said this was erroneous because the amount of damages exceeded the ad damnum which was but \$1100.67. Counsel

was held, that such a course of conduct of the company estopped it from insisting upon a forfeiture for non-payment within such time without giving personal notice, that thereafter prompt payment would be required." He thinks the notice claimed to have been given by defendant was wholly insufficient to forfeit Martin's membership for past delinquency. But in any event, whether any notice was given was a question for the jury.

Complaint is also made that there is a fatal variance between the allegations of the complaint and the evidence which amounts to a total lack of proof. In support of this it is said the complaint alleged compliance had been made with all of the provisions of the beneficial certificate while the proof showed no proof of death, as required, had been made. It is obvious that had proofs of death been made it would have been unavailing because defendant denied liability. On the trial and in this court defendant contended that Martin was suspended prior to his death. The law does not require the doing of a useless act. The allegation was unnecessary. The point now made was not mentioned on the trial and cannot be urged here.

Complaint is made to the giving of instructions Nos. 4 and 11 at plaintiffs' request. By instruction No. 2 the jury was instructed that the local lodge was the agent of the Grand or Superior Lodge and from what we have heretofore said, the instruction was proper. By instruction No. 4 the jury were told that if defendant, by its acts and conduct had waived prompt payment it could not, without giving reasonable notice, insist upon prompt payment and declare a forfeiture. This contention is also disposed of adversely to defendant's contention for the reasons heretofore stated. Instruction No. 11 told the jury that if they found the issues for plaintiffs the measure of damages was \$1000, the face of the certificate with interest to the date of the death of the insured and it is said this was erroneous because the amount of damages exceeded the \$1000 which was the measure of damages.

says: "This objection is not argued as a distinct reason for reversal *** for the reason that the Record does not show that the attention of the trial court was called to the fact that the verdict exceeded the ad damnum, *** and Defendant concedes that the trial Court should have been granted an opportunity to make a timely correction."

For the reasons stated, the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and McSurely, J. concur.

says: "This objection is not argued as a distinct reason for reversal *** for the reason that the Record does not show that the attention of the trial court was called to the fact that the verdict exceeded the ad damnum," *** and Defendant conceded that the trial Court should have been granted an opportunity to make a timely correction."

For the reasons stated, the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Masterson, J., and McSurely, J. concur.

41698

LAWDALE NATIONAL BANK, Trustee,
Appellee,

v.

HAWTHORNE ROOFING TILE COMPANY,
a Corporation, et al.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

ANNA F. CARLSON,

Appellant.

311 I.A. 245'

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The Lawndale National Bank (trustee named in a trust deed dated March 15, 1928, executed by the Hawthorne Roofing Tile Company, a corporation, to secure an indebtedness of \$35,000) filed its suit in chancery December 12, 1938, to reform the trust deed and to foreclose the lien of the trust deed as reformed.

The Hawthorne Roofing Tile Company, a corporation, the mortgagor, and Anna F. Carlson, were named as defendants. Afterward the complaint was amended and other parties were made additional defendants but so far as the record discloses no one appeared except Anna F. Carlson. She filed her answer and the cause was referred to a master in chancery to take the evidence and make up his report. He found there was a mutual mistake made by the parties in describing the property in the trust deed and recommended a reformation and a decree of foreclosure. Afterward a decree was entered following the recommendations of the master, and Anna F. Carlson appeals.

The only contention made by defendant is that the court was not warranted in decreeing a reformation of the trust deed. The property conveyed by the trust deed as security, as appears from the trust deed is:

"The West One Hundred Twenty-Seven (127) feet measured on West 31st Street, of that part lying North of center of Ogden Avenue (except streets) of the East half (E 1/2) of the West half (W 1/2) of the North East Quarter (NE 1/2) of Section Thirty-two (32) Township Thirty-nine (39) North, Range Thirteen (13), East of the Third Principal Meridian."

LAWDALE NATIONAL BANK, Trustee,
Appellee,

v.

HAWTHORNE ROOFING TILE COMPANY,
a Corporation, et al.,

ANNA T. CARLSON,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

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The only contention made by defendant is that the court was not warranted in decreeing a reformation of the trust deed. The property conveyed by the trust deed as security, as appears from the trust deed is:

"The West One Hundred Twenty-seven (127) feet measured on West 31st Street, of that part lying North of center of Ogden Avenue (except streets) of the East half (E 1/2) of the West half (W 1/2) of the North East Quarter (NE 1/4) of Section Thirty-two (32) Township Thirty-nine (39) North, Range Thirteen (13), East of the Third Principal Meridian."

The master and chancellor found there was a mutual mistake in the description of the property and it was decreed that the description of the property should be:

"The West One Hundred Sixty (160) Feet measured on West 31st Street, of that part lying North of Center of Ogden Avenue (except streets) of the East half (E 1/2) of the West half (W 1/2) of the North East Quarter (NE 1/4) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Thirteen (13), East of the Third Principal Meridian."

The property abuts 127 feet on the south side of West 31st street, an east and west street in Chicago, and extends south to Ogden avenue, a street running in a northeasterly and southwesterly direction; on the west by what is described on the plat as Clyde avenue and on the east by other property. There is evidence that Clyde avenue, so-called, between Ogden avenue and West 31st street had never been dedicated and was not a public street. It is 66 feet wide, and the question in controversy is whether the property described in the trust deed covered the east 33 feet of Clyde avenue or whether the property conveyed should be measured from the east curb line of Clyde avenue if it were a street.

Whether Clyde avenue at the place in question was a public street by virtue of user is not for us to decide in this case. The master found "the west line of the East Half of the Northeast Quarter of Section 32, Township 39 North, Range 13, is in the center of Clyde Avenue, and is used as a highway, although no formal dedication was made. Clyde Avenue is immediately west of the premises involved." There is no contention but that the west line of the east half of the northeast quarter of the section is as found by the master.

The original plat survey made of the property in 1925 was given to the person who drew the trust deed by Mr. Carlson, who at the time was president and principal stockholder of the Roofing Company, and was used in the preparation of the trust deed and therefore properly admitted in evidence. There was no need of calling the surveyor or making the other proof of the plat.

The master and chancellor found there was a mutual mistake in the description of the property and it was decreed that the description of the property should be:

"The West One Hundred Sixty (160) Feet measured on West 31st Street, of that part lying North of Center of Ogden Avenue (except streets) of the East half (E 1/2) of the West half (W 1/2) of the North East Quarter (NE 1/4) of Section Thirty-two (32), Township Thirty-nine (39) North, Range Thirteen (13), East of the Third Principal Meridian."

The property abuts 127 feet on the south side of West 31st Street, an east and west street in Chicago, and extends south to Ogden Avenue, a street running in a northeasterly and southwesterly direction; on the west by what is described on the plat as Clyde Avenue and on the east by other property. There is evidence that Clyde Avenue, so-called, between Ogden Avenue and West 31st Street had never been dedicated and was not a public street. It is 66 feet wide, and the question in controversy is whether the property described in the trust deed covered the east 32 feet of Clyde Avenue or whether the property conveyed should be measured from the east curblane of Clyde Avenue if it were a street.

Whether Clyde Avenue at the place in question was a public street by virtue of user is not for us to decide in this case. The master found "the west line of the East Half of the Northeast Quarter of Section 32, Township 39 North, Range 13, is in the center of Clyde Avenue, and is used as a highway, although no formal dedication was made. Clyde Avenue is immediately west of the premises involved." There is no contention but that the west line of the east half of the northeast quarter of the section is as found by the master.

The original plat survey made of the property in 1935 was given to the person who drew the trust deed by Mr. Carlson, who at the time was president and principal stockholder of the Roofing Company, and was used in the preparation of the trust deed and therefore properly admitted in evidence. There was no need of calling the surveyor or making the other proof of the plat

The master also found "The parties made a mutual mistake in inserting the legal description; their intention and purpose was to convey the parcel of property lying 127 feet east of that point, which would be the east curb line of Clyde Avenue"; that from the east curb line of Clyde avenue to the center of that avenue was 33 feet. The master continues and finds, "The recital in the trust deed should be reformed to comport with the intention of the parties to read: 'The West One Hundred Sixty (160) feet measured on West 31st Street,'" continuing with the description of the property the same as that found in the trust deed. The decree followed the master in this respect.

Mrs. Carlson filed objections to the master's report in which she (among other objections) contended the master erred in holding "that it was the intention of the parties to convey 'the west 127 feet east of that point which would be the east curb line of Clyde avenue'"; that he erred in holding there was a mutual mistake in describing the property; that he erred "in not finding that the west 127 feet" (being the property mortgaged in the trust deed in issue) commenced at its westerly boundary line which would be the prolongation of Clyde avenue.

The record discloses that if the west boundary of the property was the middle of Clyde avenue as defendant contended in her objections and extended 127 feet east, the east line of the property would pass through a one-story brick building which was owned and occupied by the roofing company at the time. Of course this contention is absurd on its face. It is clear the roofing company intended to include this building in the mortgage. And in addition, the absurdity that this building was not intended to be conveyed by the mortgage appears from the description of the property in the trust deed. The trust deed conveys the property as hereinbefore quoted "Together with all buildings, improvements and appurtenances thereunto attached or belonging, including all

The master also found "The parties made a mutual mistake

in inserting the legal description; their intention and purpose was to convey the parcel of property lying 127 feet east of that point, which would be the east curb line of Glyde Avenue"; that from the east curb line of Glyde Avenue to the center of that avenue was 33 feet. The master continues and finds, "The recital in the trust deed should be reformed to comport with the intention of the parties to read: 'The West One Hundred Sixty (160) feet measured on West 31st Street,' continuing with the description of the property the same as that found in the trust deed. The decree followed the master in this respect.

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The record discloses that if the west boundary of the property was the middle of Glyde Avenue as defendant contended in her objections and extended 127 feet east, the east line of the property would pass through a one-story brick building which was owned and occupied by the roofing company at the time. Of course this contention is absurd on its face. It is clear the roofing company intended to include this building in the mortgage. And in addition, the absurdity that this building was not intended to be conveyed by the mortgage appears from the description of the property in the trust deed. The trust deed conveys the property as hereinbefore quoted "Together with all buildings, improvements and appurtenances thereto attached or belonging, including all

engines, boilers, vats," etc.

There might be some doubt as to whether there was a mistake made in the description of the property because it describes the west 127 feet "except streets" which would exclude West 31st street, Ogden avenue and probably Clyde avenue. In view of the contention of Mrs. Carlson that the 127 feet began at the center line of Clyde avenue, we think the court was warranted in decreeing the 127 feet commenced at the east curb line of Clyde avenue. But we are unable to agree that the trust deed should be reformed so as to provide that it conveyed the "west 160" feet beginning at the center of Clyde avenue. We think the parties did not intend to convey any part of Clyde avenue whether it was a public street or otherwise, but they did intend the trust deed should convey 127 feet beginning at the east curb line of Clyde avenue.

In the original complaint no suggestion was made that the trust deed be reformed but the prayer was the ordinary one of foreclosure. In the amendment to the complaint a reformation of the trust deed was sought so that the property covered by the mortgage was the west 170 feet, etc. The master's report and the decree found the trust deed should be reformed so the property would be described as the west 160 feet and the record discloses plaintiff contended on the hearing that the mortgage covered the west 170 feet commencing at the center line of Clyde avenue, that is, complainant was claiming 10 feet more than the decree provided, which 10 feet apparently belonged at the time of the execution of the trust deed to the roofing company.

While the question is not properly before us we are unable to see what interest Mrs. Carlson has in the property. Her counsel testified "I am the attorney representing Anna F. Carlson, widow of Carl A. Carlson, principal stockholder of the Hawthorne Roofing Tile Company." And in his brief he says Carl A. Carlson, now deceased, was president and principal stockholder of the roofing company and "His widow, Anna F. Carlson, defendant herein,

engines, boilers, vats," etc.

There might be some doubt as to whether there was a mistake made in the description of the property because it described the west 127 feet "except streets" which would exclude West 21st street, Ogden avenue and probably Clyde avenue. In view of the contention of Mrs. Carlson that the 127 feet began at the center line of Clyde avenue, we think the court was warranted in decreeing the 127 feet commenced at the east curb line of Clyde avenue. But we are unable to agree that the trust deed should be reformed so as to provide that it conveyed the "west 160" feet beginning at the center of Clyde avenue. We think the parties did not intend to convey any part of Clyde avenue whether it was a public street or otherwise, but they did intend the trust deed should convey 127 feet beginning at the east curb line of Clyde avenue.

In the original complaint no suggestion was made that the trust deed be reformed but the prayer was the ordinary one of foreclosure. In the amendment to the complaint a reformation of the trust deed was sought so that the property covered by the mortgage was the west 170 feet, etc. The master's report and the decree found the trust deed should be reformed so the property would be described as the west 160 feet and the record discloses plaintiff contended on the hearing that the mortgage covered the west 170 feet commencing at the center line of Clyde avenue, that is, complainant was claiming 10 feet more than the decree provided, which 10 feet apparently belonged at the time of the execution of the trust deed to the roofing company.

While the question is not properly before us we are unable to see what interest Mrs. Carlson has in the property. Her counsel testified "I am the attorney representing Anna F. Carlson, widow of Carl A. Carlson, principal stockholder of the Hawthorne Roofing Tile Company." And in his brief he says Carl A. Carlson, now deceased, was president and principal stockholder of the roofing company and "His widow, Anna F. Carlson, defendant herein,

is now the principal stockholder of the Hawthorne Roofing Tile Co." But in the decree it is found that the "Hawthorne Roofing Tile Company, a corporation, was dissolved by order of the Superior court of Cook county upon the 14th day of July, A. D. 1933." Assuming the corporation was properly dissolved, we are unable to see how Mrs. Carlson or anyone else could be a stockholder.

For the reasons stated the decree of the Circuit court of Cook county is reversed as to the description of the property only. In all other respects it is affirmed. Three-fourths of the costs in the trial court and in this court are taxed against Mrs. Carlson.

THE DECREE OF THE CIRCUIT COURT OF COOK COUNTY
IS AFFIRMED IN PART REVERSED IN PART AND
REMANDED WITH DIRECTIONS.

McSurely, P.J., and Matchett, J., concur.

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For the reasons stated the decree of the Circuit Court of Cook County is reversed as to the description of the property only. In all other respects it is affirmed. Three-fourths of the costs in the trial court and in this court are taxed against Mrs. Carlson.

THE DECREE OF THE CIRCUIT COURT OF COOK COUNTY IS AFFIRMED IN PART REVERSED IN PART AND REMANDED WITH DIRECTIONS.

Mesurely, P. J., and Mathelet, J. concur.

41011

GEORGE CHRISTIAN,
Appellee.

v.

PETER SMIRINOTIS,
Appellant.

APPEAL FROM COUNTY COURT,
COOK COUNTY.

311 A. 245²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, George Christian, recovered a judgment against defendant, Peter Smirinotis, before a justice of the peace. Defendant appealed to the County court. The appeal was dismissed January 3, 1935. Afterward, March 17, 1936, defendant filed a petition to reinstate the appeal, which was in the nature of a petition for a writ of error coram nobis. The County court overruled defendant's motion and an appeal was prosecuted to this court. (Case No. 39093.) We reversed the order of March 17, 1936, and remanded the cause to the County court with directions to permit plaintiff to answer defendant's petition to vacate the order of January 3, 1935, and "for such further proceedings as are not inconsistent with this opinion." When the cause was redocketed in the County court plaintiff filed an answer, March 4, 1938, alleging various matters in reply to defendant's petition in the nature of a writ of error coram nobis. Thereafter, March 25, 1938, defendant filed a replication to plaintiff's answer, which the court evidently regarded as a motion to strike the answer, and this motion was overruled by the court. Without hearing any evidence, however, the court entered an order reinstating the cause and setting it for trial, and from that order plaintiff prosecuted a second appeal. In our opinion affirming the order from which the second appeal was prosecuted (General No. 40378), we said that "it was clearly intended that the cause should proceed to hearing on the merits of the petition for a writ of error coram nobis and any answer thereto that might be filed by plaintiff," and in affirming

41011

GEORGE CHRISTIAN
Appellee,

v.

PETER SMITHOLIS,
Appellant.

APPEAL FROM COUNTY COURT,

COOK COUNTY,

811 A. 245

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, George Christian, recovered a judgment against defendant, Peter Smitholus, before a justice of the peace. Defendant appealed to the County court. The appeal was dismissed January 3, 1935. Afterwards, March 17, 1935, defendant filed a petition to reinstate the appeal, which was in the nature of a petition for a writ of error coram nobis. The County court overruled defendant's motion and an appeal was prosecuted to this court. (Case No. 39093.) We reversed the order of March 17, 1935, and remanded the cause to the County court with directions to permit plaintiff to answer defendant's petition to vacate the order of January 3, 1935, and "for such further proceedings as are not inconsistent with this opinion." When the cause was reocketed in the County court plaintiff filed an answer, March 4, 1938, alleging various matters in reply to defendant's petition in the nature of a writ of error coram nobis. Thereafter, March 25, 1938, defendant filed a replication to plaintiff's answer, which the court evidently regarded as a motion to strike the answer, and this motion was overruled by the court. Without hearing any evidence, however, the court entered an order reinstating the cause and setting it for trial, and from that order plaintiff prosecuted a second appeal. In our opinion affirming the order from which the second appeal was prosecuted (General No. 40373), we said that "it was clearly intended that the cause should proceed to hearing on the merits of the petition for a writ of error coram nobis and any answer thereto that might be filed by plaintiff." and in affirming

the order we indicated that "plaintiff should be allowed to file an answer to the petition for a writ in the nature of a writ of error coram nobis, *** and the parties should then proceed to a hearing before the court on the merits of the petition and answer."

After the matter was redocketed in the County court for the second time, plaintiff on June 2, 1939, filed an amended answer to the petition in the nature of a writ of error coram nobis, in which he covered, either by way of denial or admission, the various allegations in defendant's petition, but made one significant change in the averments relating to the dismissal of the appeal by the County court, i.e., in his first answer George Christian, plaintiff, had averred that "the defendant knew or should have known that the appeal was dismissed January 3, 1935." We indicated in one of our opinions that this averment was objectionable, and therefore when the cause was docketed in the County court the second time plaintiff in his amended answer averred that "the defendant at that term of the court knew and had ample means of knowing that his appeal was dismissed and that he, nevertheless, acquiesced in said final judgment of this court dismissing his appeal ***." Defendant, Peter Smirinotis, thereupon moved to strike plaintiff's amended answer. The County court denied the motion, but without hearing any evidence entered an order allowing the petition of defendant to vacate the order entered January 3, 1935, whereby the appeal of defendant from the judgment of the justice of the peace was dismissed, and setting the appeal to be tried on its merits, de novo, on September 17, 1939.

Plaintiff has prosecuted the third appeal from this order upon the sole contention ~~that~~ defendant's motion to strike plaintiff's amended answer admitted all the averments well pleaded; that among them was the averment that "defendant at that term of the court knew and had ample means of knowing that his appeal was dismissed and that he, nevertheless, acquiesced in said final judg-

the order as indicated that "plaintiff should be allowed to file an answer to the petition for a writ in the nature of a writ of error coram nobis, *** and the parties should then proceed to a hearing before the court on the merits of the petition and answer." After the matter was reheard in the County court for the second time, plaintiff on June 5, 1935, filed an amended answer to the petition in the nature of a writ of error coram nobis, in which he covered, either by way of denial or admission, the various allegations in defendant's petition, but made one significant change in the averments relating to the dismissal of the appeal by the County court, i.e., in his first answer George Christian, plaintiff, had averred that "the defendant knew or should have known that the appeal was dismissed January 3, 1935." He indicated in one of our opinions that this averment was objectionable, and therefore when the case was docketed in the County court the second time plaintiff in his amended answer averred that "the defendant at that term of the court knew and had ample means of knowing that his appeal was dismissed and that he, nevertheless, acquiesced in said final judgment of this court dismissing his appeal ***." Defendant, Peter Smirnovich, thereupon moved to strike plaintiff's amended answer. The County court denied the motion, but without hearing any evidence entered an order allowing the petition of defendant to vacate the order entered January 3, 1935, whereby the appeal of defendant from the judgment of the Justice of the Peace was dismissed, and setting the appeal to be tried on its merits, de novo, on September 17, 1935.

Plaintiff has prosecuted the third appeal from this order upon the sole contention that defendant's motion to strike plaintiff's amended answer admitted all the averments well pleaded; that among them was the averment that "defendant at that term of the court knew and had ample means of knowing that his appeal was dismissed and that he, nevertheless, acquiesced in said final judgment

ment of this court dismissing his appeal ***, " and the court having denied defendant's motion to strike the amended answer, should have dismissed defendant's petition in the nature of a petition for a writ of error coram nobis, instead of allowing it and setting the appeal down for hearing September 17, 1939.

The averment of defendant's knowledge as contained in plaintiff's amended answer has no facts to support it; although it is averred that defendant had ample means of knowing that his appeal was dismissed, and that he nevertheless acquiesced in the final judgment, no facts or circumstances are averred to support this conclusion; therefore, it must be considered as nothing more than a conclusion of the pleader and not such an allegation in a pleading as would be held to be admitted by the motion to strike.

We have twice indicated our view of the procedure that this appeal should follow when redocketed in the County court, but the trial court and the parties seem to persist in placing some construction upon our mandate which does violence to the clear language thereof. Our mandate on the second appeal reads: "It is considered that the order of May 10, 1938, be affirmed, in consequence of which plaintiff should be allowed to file an answer to the petition for a writ in the nature of a writ of error coram nobis, not inconsistent with the views expressed in the opinion of this court this day filed herein, and the parties should then proceed to a hearing before the Court on the merits of the petition and answer." Plaintiff now having filed his amended answer, and the court having denied a motion to strike the same should set defendant's petition for a writ in the nature of a writ of error coram nobis and plaintiff's answer thereto down for hearing to determine whether or not the petition should be allowed. Such^a petition is the beginning of a new suit (Mitchell v. King, 187 Ill. 452), in which new issues are made up on which there must be a finding and judgment.

Therefore the order of the County court from which this

ment of this court dismissing his appeal ***," and the court having denied defendant's motion to strike the amended answer, should have dismissed defendant's petition in the nature of a petition for a writ of error coram nobis, instead of allowing it and setting the appeal down for hearing September 17, 1939.

The averment of defendant's knowledge as contained in plaintiff's amended answer has no facts to support it; although it is averred that defendant had ample means of knowing that his appeal was dismissed, and that he nevertheless acquiesced in the final judgment, no facts or circumstances are averred to support this conclusion; therefore, it must be considered as nothing more than a conclusion of the pleader and not such an allegation in a pleading as would be held to be admitted by the motion to strike. We have twice indicated our view of the procedure that

this appeal should follow when redocketed in the County court, but the trial court and the parties seem to persist in placing some construction upon our mandate which does violence to the clear language thereof. Our mandate on the second appeal reads: "It is considered that the order of May 19, 1938, be affirmed, in consequence of which plaintiff should be allowed to file an answer to the petition for a writ in the nature of a writ of error coram nobis, not inconsistent with the views expressed in the opinion of this court this day filed herein, and the parties should then proceed to a hearing before the Court on the merits of the petition and answer." Plaintiff now having filed his amended

answer, and the court having denied a motion to strike the same should set defendant's petition for a writ in the nature of a writ of error coram nobis and plaintiff's answer thereof down for hearing to determine whether or not the petition should be allowed. Such³ petition is the beginning of a new writ (Hitchell v. Kiser, 187 Ill. 452), in which new issues are made up on which there

must be a finding and judgment. Therefore the order of the County court from which this

appeal is prosecuted is reversed and the cause is remanded with directions that defendant's petition in the nature of a writ of error coram nobis and plaintiff's amended answer thereto be set down for hearing at an early date; that pursuant to the hearing the court enter an order either allowing the petition or dismissing it; that in the event the court should order the petition to be allowed after a hearing, an appropriate order be entered to that effect, and that the order of dismissal of the appeal from the justice of the peace be vacated and the appeal be set down for hearing on its merits de novo, under the prescribed practice governing the hearing of appeals from justices of the peace.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

appeal is presented as a matter of course is reversed with
directions that defendant's position in the return of a writ of
error coram nobis and habeas corpus should be set
down for hearing at an early date; that pursuant to the hearing
the court enter an order either allowing the petition or dismissing
it; that in the event the court should order the petition to be
allowed after a hearing, an appropriate order be entered to that
effect, and that the order of dismissal of the appeal from the
justice of the peace be vacated and the appeal be set down for
hearing on its merits de novo, under the prescribed practice
governing the hearing of appeals from justices of the peace.
JULIUS AND RICHARD WITH DIRECTIVES.

Scannan and Sullivan, JJ., concur.

41067

MANSFIELD WILLIAM MORGAN,
Plaintiff,

v.

JOSEPH LUDWIG, doing business
as The Cornelia Tavern, and
SAM VOLD,
Defendants.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

SAM VOLD and SHANE VOLD,
Appellants,

v.

MANSFIELD WILLIAM MORGAN and
JOSEPH JANSSEN, sued as JOSEPH
LUDWIG, doing business as
The Cornelia Tavern,
Appellees.

311 I.A. 246

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

February 21, 1939, Mansfield William Morgan filed in the Municipal court his statement of claim in tort against Joseph Janssen, sued as Joseph Ludwig, doing business as The Cornelia Tavern, and Sam Vold, owner and lessor of the premises on which Janssen conducted a tavern. The statement of claim consisted of four counts and was predicated upon sections 14 and 15 of Article VI of "An Act relating to alcoholic liquors" (pars. 135 and 136, chap. 43, Ill. Rev. Stats., 1939), commonly known as the Dram Shop Act. Count 1 was premised upon a violation of the dram shop act and sought to recover damages against Sam Vold as owner of the premises, and Joseph Ludwig, as tenant and proprietor of the tavern. Count 2 sought damages against Ludwig, individually, based upon a charge of assault. Count 3 was directed against Ludwig, individually, and sought damages for assault and imprisonment, and count 4 was against Ludwig, individually, and sought damages for false imprisonment and malicious prosecution.

No summons was originally served on Sam Vold but process was had upon Ludwig, who failed to appear or interpose a defense

41067

MANFIELD WILLIAM MORGAN, Plaintiff,

v.

JOSEPH LUDWIG, doing business as The Cornelia Tavern, and SAM VOID, Defendants.

SAM VOID and SHANE VOID, Appellants,

v.

MANFIELD WILLIAM MORGAN and JOSEPH LUDWIG, doing business as The Cornelia Tavern, Appellees.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO

3111 A. 246

MR. PRESIDING JUSTICE FRANK D. BROWN delivered the opinion of the court.

February 21, 1939. Defendant William Morgan filed in

the Municipal Court his statement of claim in tort against

Joseph Janassen, sued as Joseph Ludwig, doing business as The

Cornelia Tavern, and Sam Vold, owner and lessee of the premises

on which Janassen conducted a tavern. The statement of claim con-

tained four counts and was predicated upon sections 14 and 15

of Article VI of "An act relating to alcoholic liquors" (para.

135 and 136, chap. 43, Ill. Rev. Stat., 1939), commonly known as

the Dram Shop Act. Count 1 was predicated upon a violation of the

dram shop act and sought to recover damages against Sam Vold as

owner of the premises, and Joseph Ludwig, as tenant and proprietor

of the tavern. Count 2 sought damages against Ludwig, individually,

based upon a charge of assault. Count 3 was directed against Ludwig

individually, and sought damages for assault and imprisonment, and

Count 4 was against Ludwig, individually, and sought damages for

false imprisonment and malicious prosecution.

No summons was originally served on Sam Vold but process

was had upon Ludwig, who failed to appear or interpose a defense

and default was entered against him March 7, 1939. Two days later the cause was called for trial, and "the court having heard the evidence," as recited in the order, judgment was entered against Janssen, sued as Ludwig, for \$500. An alias summons was issued against Vold and served April 3, 1939. Thereafter, April 26, 1939, he filed his appearance, demanded trial by jury, and interposed a motion to strike the first count of the statement of claim on the ground that it did not state a cause of action. This motion was sustained by the court.

May 29, 1939, Sam Vold and Shane Vold, hereinafter referred to as petitioners, filed a verified petition to vacate the judgment theretofore, on March 7, 1939, entered against Ludwig, in which they alleged that they were the owners of the property in question, which was improved with a building, a portion of which had been leased to Janssen for the sale of alcoholic liquors and used by him for the operation of a tavern; that Morgan had theretofore filed his statement of claim in the Municipal court, February 21, 1939, joining Sam Vold and Ludwig, doing business as The Cornelia Tavern, as defendants; that summons was issued against both defendants, but was not served upon Vold, who had no knowledge or information of the filing of the suit; that thereafter the bailiff of the Municipal court made return of summons, certifying that he had served same upon Janssen, sued as Joseph Ludwig; that Ludwig, or Janssen, filed no appearance and interposed no defense, and that default was therefore entered against him; that thereafter, without notice to Ludwig, plaintiff had judgment against him, doing business as Cornelia Tavern, in the sum of \$500 and costs; that subsequently Morgan caused an alias summons to issue against Sam Vold, which together with a statement of claim was served upon him April 3, 1939; that neither of the petitioners had any knowledge of the filing or pendency of the suit until April 3, 1939, and were unaware that any judgment had been taken against Ludwig, until May 15, 1939; that on the return day of the alias summons, April 26, 1939, Sam

and a trial was entered in the court on March 7, 1939. Two days later the cause was called for trial, and the court having heard the evidence, as recited in the order, judgment was entered against Janssen, and as directed, for \$500. An alias summons was issued against Vold and served on April 3, 1939. Thereafter, April 26, 1939, he filed his appearance, demanded trial by jury, and interposed a motion to strike the first count of the statement of claim on the ground that it did not state a cause of action. This motion was sustained by the court.

May 20, 1939, Sam Vold and Shane Vold, hereinafter referred to as petitioners, filed a verified petition to vacate the judgment theretofore, on March 7, 1939, entered against Ludwig, in which they alleged that they were the owners of the property in question, which was involved with a building, a portion of which had been leased to Janssen for the sale of alcoholic liquors and used by him for the operation of a tavern; that Morgan had theretofore filed his statement of claim in the Municipal court, February 21, 1939, joining Sam Vold and Ludwig, doing business as The Cornelia Tavern, as defendants; that summons was issued against both defendants, but was not served upon Vold, who had no knowledge or information of the filing of the suit; that thereafter the bailiff of the Municipal court made return of summons, certifying that he had served same upon Janssen, and as Joseph Ludwig; that Ludwig, or Janssen, filed no appearance and interposed no defense, and that default was theretofore entered against him; that thereafter, without notice to Ludwig, plaintiff had judgment against him, doing business as Cornelia Tavern, in the sum of \$500 and costs; that subsequently Morgan caused an alias summons to issue against Sam Vold, which together with a statement of claim was served upon him April 3, 1939; that neither of the petitioners had any knowledge of the filing or pendency of the suit until April 3, 1939, and were unaware that any judgment had been taken against Ludwig, until May 15, 1939;

Vold filed his appearance and jury demand, and procured an order from the court extending his time to plead for a period of ten days, and within that time filed his motion to strike the first count, which was allowed by the court; that the judgment against Ludwig, being in full force, Morgan, through his counsel, had stated that he intended to immediately enforce the judgment as a lien on petitioners' property. The petition asked that the judgment be vacated and a new trial granted, or in the alternative that the record be amended by striking therefrom the first count of the statement of claim, and reciting that the default judgment against Ludwig was premised on the 2nd, 3rd and 4th counts thereof. Thereafter Morgan's counsel moved to strike the foregoing petition and dismiss the same. The court allowed the motion, and Sam and Shane Vold have prosecuted this appeal from that order.

The principal question involved is whether petitioners, who are not parties to the judgment but who claim to have an interest therein by reason of the fact that the judgment constitutes a lien upon their property, have a right to complain. They cite several decisions, including Green v. Hutsonville Township High School District, 356 Ill. 216; In re George Burdick, 162 Ill. 48; Goodnough v. Sheppard, 28 Ill. 81, and others to support their position. In the Green case complainants, as taxpayers, of a school district, filed their bill in equity against the board of education, county treasurer and others to enjoin payment of certain judgments that had been obtained by third parties against the district. The school board had authorized the construction of a school house at a cost in excess of the constitutional limitation. The building was erected and thereafter certain creditors filed suits in the Circuit court, in each of which the board of education entered its appearance and confessed judgment. Subsequently the board, by an election, authorized the district to issue its bonds for the purpose of paying these judgments. These bonds were issued

Void filed his appearance and jury demand, and proceeded on from the court extending his time to plead for a period of ten days, and within that time filed his motion to vacate the first count, which was allowed by the court; then the judgment against Ludwig, being in full force, Morgan, through his counsel, stated that he intended to immediately enforce the judgment as a lien on petitioners' property. The petition asked that the judgment be vacated and a new trial granted, on the alternative that the record be amended by striking therefrom the first count of the statement of claim, and reciting that the default judgment against Ludwig was pronounced on the 2nd, 3rd and 4th counts thereof. Thereafter Morgan's counsel moved to strike the foregoing petition and dismiss the same. The court allowed the motion, and then and there Void have prosecuted this appeal from that order.

The principal question involved is whether petitioners, who are not parties to the judgment but who claim to have an interest therein by reason of the fact that the judgment constitutes a lien upon their property, have a right to complain. They cite several decisions, including Green v. Watsonville Township High School District, 256 Ill. 616; In re George Smith, 162 Ill. 48; Goodman v. Shepard, 28 Ill. 91, and others to support their position. In the Green case complainants, as defendants, of a school district, filed their bill in equity against the board of education, county treasurer and others to enjoin payment of certain judgments that had been obtained by third parties against the district. The school board had authorized the construction of a school house at a cost in excess of the constitutional limitation. The building was erected and thereafter certain creditors filed suits in the Circuit court, in each of which the board of education entered its appearance and confessed judgment. Subsequently the board, by an election, authorized the district to issue its bonds for the purpose of paying these judgments. These bonds were issued

and sold. Defendants' demurrer to the bill was sustained under the contention that these judgments could not be attacked collaterally. The Supreme court reversed the order, however, saying (at pp. 221-222) that regardless of the general rule a judgment cannot be collaterally attacked, and is conclusive between the parties "there is a further rule which has been repeatedly sustained in this court, and, so far as we know, in all other courts. *** that whenever a judgment is procured through fraud and collusion for the purpose of defrauding some third person, such third person may show collaterally the fraud and collusion by which the judgment was obtained and escape the burdens and injuries thus thrust upon him."

In Goodnough v. Sheppard, 28 Ill. 81, the latter brought a bill praying for an injunction to restrain defendants from executing a writ for possession of real estate, which showed that Sheppard had purchased the property, that a deed had been delivered to him, and that he took possession and lived on the premises until the filing of the bill. It was alleged that Sheppard was not a party to the suit, and that he purchased the property in good faith. Defendants claimed title thereto by virtue of a deed from a second line of alleged owners, but Sheppard contended that he knew of no incumbrance on the property and that Reynolds, from whom he had purchased it, had the absolute title thereto. Defendants' demurrer was overruled and the injunction was made perpetual. In commenting on these circumstances, the Supreme court said that the case was so palpable as to make it impossible to reason upon it; that it was a plain case of an attempt, by process of law against one party to subject another party and a stranger, to the inconvenience of being turned out of the possession of property which he lawfully owned, without any judgment or process against him; that a bare statement of the case showed its injustice, the propriety of the interposition of the court to stop the proceeding, and that the bill showed such

and sold. Defendants' answer to the bill was that under the contention that these judgments could not be attacked collaterally. The Supreme Court reversed the order, however, saying that the bill- (22) that regardless of the general rule a judgment cannot be collaterally attacked, and is conclusive between the parties "there is a further rule which has been repeatedly sustained in this court, and, so far as we know, in all other courts. * * * that whenever a judgment is procured through fraud and collusion for the purpose of defrauding some third person, such bill is not collaterally the fraud and collusion by which the judgment was obtained and escape the bar and injuries thus caused upon it."

In Goodman v. Shepard, 28 Ill. 31, the latter brought a bill praying for an injunction to restrain defendants from executing a writ for possession of real estate, which showed that Shepard had purchased the property, that a deed had been delivered to him, and that he took possession and lived on the premises until the filing of the bill. It was alleged that Shepard was not a party to the suit, and that he purchased the property in good faith. Defendants claimed title thereto by virtue of a deed from a second line of alleged owners, but Shepard contended that he knew of no insurance on the property and that Reynolds, from whom he had purchased it, had the absolute title thereto. Defendants' answer was overruled and the injunction was made perpetual. In commenting on these circumstances, the Supreme Court said that the case was so palpable as to make it impossible to reason upon it; that it was a plain case of an attempt, by process of law against one party to subject another party and a stranger, to the inconvenience of being turned out of the possession of property which he lawfully owned, without any judgment or process against him; that a bare statement of the case showed its injustice, the propriety of the intervention of the court to stop the proceeding, and that the bill showed such

equities as to entitle complainant to the remedy granted.

In the Burdick case, 162 Ill. 48, the court announced the doctrine that persons making application to set aside a judgment after the end of the term must either be a party thereto or in privity with such party, or be possessed of rights or equities which are directly and injuriously affected by the judgment.

We have examined the other cases cited by petitioners, but they are severally to the effect that where fraud or collusion was exercised between plaintiff and defendant the court allowed the interposition of strangers to the judgment whose rights had been seriously affected thereby. In the case at bar there is no charge or allegation of fraud or collusion and therefore in our opinion these cases are not applicable. Petitioners proceeded in the Municipal court upon the theory that the court had general equitable jurisdiction to set aside its own judgments after term. They rely upon par. 376, sec. 21, chap. 37, Ill. Rev. Stats., 1939, which reads: "That there shall be no stated terms of the Municipal court, but said court shall always be open for the transaction of business. Every judgment, order or decree of said court, final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a Circuit court during the term at which the same was rendered in such Circuit court, provided a motion to vacate, set aside or modify the same be entered in said Municipal court within 30 days after the entry of such judgment, order or decree. If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within 30 days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified, excepting upon appeal, or writ of error, or by a bill in equity, or by a petition to said Municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity;

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reads: "That there shall be no stated terms of the Municipal court, but said court shall always be open for the transaction of business.

Every judgment, order or decree of said court, final in its nature

shall be subject to be vacated, set aside or modified in the same

manner and to the same extent as a judgment, order or decree of a

Circuit court during the term at which the same was rendered in which

Circuit court, provided a motion to vacate, set aside or modify

the same be entered in said Municipal court within 30 days after

the entry of such judgment, order or decree. If no motion to

vacate, set aside or modify any such judgment, order or decree shall

be entered within 30 days after the entry of such judgment, order or

decree, the same shall not be vacated, set aside or modified, except

upon appeal, or writ of error, or by a bill in equity, or by a petition

to said Municipal court setting forth grounds for vacating, setting

aside or modifying the same, which would be sufficient to cause the

same to be vacated, set aside or modified by a bill in equity;

Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion or the judgment may be set aside, in the manner provided by law for similar cases in the Circuit Courts." Decisions interpreting this statute have gone no further than to hold that the act "manifestly contemplates conferring on such court only such power as a court of equity could exercise in a similar case under analogous proceedings, at least so far as they afford an opportunity for the formation of issues and a hearing thereon." (Imbrie v. Bear, 230 Ill. App. 155.) Applying this rule, the inquiry arises whether petitioners may invoke the powers of a court of equity to vacate or modify the judgment. Since in our view strangers to a judgment, though their interest may be affected thereby, cannot in equity or law attack the same unless fraud and collusion exist between the judgment creditor and the judgment debtor, or unless some special circumstances, which are not present in this case, would move a court of equity to remedy a palpable wrong, it would follow that this is not the kind of case where a court of equity would lend its hand to set aside the judgment, especially after the expiration of the term, and therefore we are constrained to hold that the Municipal court had no such power.

One of the essential elements of a petition seeking to set aside a judgment after the expiration of the term is the allegation of a meritorious defense. Petitioners make no such allegation and for aught that appears of record we must assume that no good defense existed to Morgan's claim.

It is argued, of course, that count 1 having been held defective, the judgment should be modified so as to make it applicable only to counts 2, 3 and 4. It was conceded by Morgan's counsel on oral argument that count 1 was inartificially drawn, but under the practice in the Municipal court a fourth class tort case is made by the evidence and not by the pleadings. The judgment in this

Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion or the judgment may be set aside, in the manner provided by law for similar cases in the Circuit Courts." Decisions interpreting this statute have gone no further than to hold that the act "manifestly contemplates conferring on such court only such power as a court of equity could exercise in a similar case under analogous proceedings at least so far as they afford an opportunity for the formation of issues and a hearing thereon." (*Imrie v. Bear*, 230 Ill. App. 172.) Applying this rule, the inquiry arises whether petitioners may invoke the powers of a court of equity to vacate or modify the judgment. Since in our view strangers to a judgment, though their interest may be affected thereby, cannot in equity or law attack the same unless fraud and collusion exist between the judgment creditor and the judgment debtor, or unless some special circumstances, which are not present in this case, would move a court of equity to remedy a palpable wrong, it would follow that this is not the kind of case where a court of equity would lend its hand to set aside the judgment, especially after the expiration of the term, and therefore we are constrained to hold that the municipal court had no such power.

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case recites that the court "having heard the evidence," finds in favor of the plaintiff and enters judgment accordingly. No transcript of proceedings is brought before us, and we must therefore indulge every presumption in favor of the validity of the judgment. This is fundamental in the law and has been consistently adhered to by the decisions in this state. (Bush v. Hanson, 70 Ill. 480.) Counsel for the respective parties devote space in their briefs to the question whether or not petitioners were in the exercise of diligence in filing their petition, but in view of our conclusion on the controlling points in the case, we think it unnecessary to discuss this question.

It is apparent from the petition that the Volds had leased the premises to Janssen for the purpose of operating a tavern, and they were charged with knowledge of the consequences resulting from the violation of the dram shop act. The judgment against Janssen is valid, and no convincing showing is made as to why it should be vacated or that the court had jurisdiction to do so. Therefore, the order of the Municipal court sustaining Morgan's motion to strike the petition and dismissing same is affirmed.

ORDER AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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ORDER AFFIRMED.

Stanley and Sullivan, JJ., concur.

41287

HAUL RAY and DOUGLAS M. RAY,
Appellees,

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

SAMUEL HASTERLIK, CLARA WOLF,
HAROLD LEDERER, JOSEPH HASTERLIK,
LEONARD WOLF, executors under the
last will and testament of CHARLES
HASTERLIK, deceased,
Appellants.

311 I.A. 246²

MR. PRESIDING JUSTICE FRIEND DELIVERED OPINION OF THE COURT.

Plaintiffs sued defendants for an alleged breach of their agreement under a 20-year lease to keep the leased premises, consisting of 16 flats and 5 stores, located in Chicago, in good condition and repair and upon the termination of the lease to yield them up in good condition, loss by fire and ordinary wear excepted, and also to pay all taxes and special assessments levied on the demised properties during the period of the lease. Trial by jury resulted in a verdict for plaintiffs of \$4,500, which included \$1,741.93 for damages to the property and the balance for taxes, a special assessment and interest. Defendants appeal from the judgment entered on the verdict.

The demised premises, located at the northwest corner of Van Buren street and Racine avenue, Chicago, were leased principally for saloon purposes, but included some additional stores and apartments. In preprohibition days a saloon was operated in the main building, which was estimated by the manager for plaintiff to be 40 or 50 years old at the termination of the lease. The lease commenced May 1, 1911, and terminated April 30, 1931. It was a long printed document with a typewritten rider attached thereto, which contained the usual provision for replacement of all broken glass, fixtures, etc., and to keep the premises in good repair; to clean the vaults and alleys in accordance with the ordinances and the direction of public officers; to remove the snow and ice from the roof; and upon termination of the lease to yield up the premises "in good condition, loss by fire and ordinary

MAUI HAY AND DOUGLAS A. HAY,
Appellants,

ALLIANCE FOR THE PROTECTION
OF THE PEOPLE'S INTERESTS,
COUNTY OF COCONINO, ARIZONA,

SAUL H. HARRIS, CLERK OF THE COURT,
HAROLD HARRIS, JUDGE OF THE COURT,
LEONARD HARRIS, JUDGE OF THE COURT,
last will and testament of Charles
HARRIS, deceased,
Appellants.

311 LA 246

MR. PRESIDING JUDGE TRIED AND DELIVERED OPINION OF THE COURT.

Plaintiffs sued defendants for an alleged breach of

their agreement under a 20-year lease to keep the leased

premises, consisting of 10 flats and 2 stores, located in

Chicago, in good condition and repair and upon the termination

of the lease to yield them up in good condition, less any five

and ordinary wear excepted, and also to pay all taxes and special

assessments levied on the demised premises during the period

of the lease. Trial by jury resulted in a verdict for plaintiffs

of \$4,500, which included \$1,741.77 for damages to the property

and the balance for taxes, a special assessment and interest.

Defendants appeal from the judgment entered on the verdict.

The demised premises, located at the northwest corner

of Van Buren street and Racine avenue, Chicago, were leased

principally for saloon purposes, but included some additional

stores and apartments. In preparation days a saloon was

operated in the main building, which was assisted by the manager

for plaintiff to be 40 or 50 years old at the termination of the

lease. The lease commenced May 1, 1911, and terminated April 30,

1931. It was a long printed document with a typewritten rider

attached thereto, which contained the usual provision for replace-

ment of all broken glass, fixtures, etc., and to keep the premises

in good repair; to clean the walls and ceilings in accordance with

the ordinance and the direction of public officers; to remove the

wear excepted." Paragraph 13 of the rider contained a provision with respect to the payment of taxes, under which the lessees agreed to "pay all taxes and special assessments levied on above described premises from May 1, 1911, to April 30, 1931."

The gravamen of the complaint is the alleged failure of defendants to yield up the premises at the termination of the lease "in good condition, loss by fire and ordinary wear excepted," and for a special assessment and general taxes for the year 1930, which were alleged to have been levied prior to April 30, 1931.

The evidence with reference to the condition of the premises at the termination of the lease consisted of photographs and the testimony of witnesses who had personally inspected the premises both prior to and at the termination of the lease. The record is replete with evidence showing that the premises were left in a dilapidated condition that is difficult to describe or believe. There was not only filth and disrepair from neglect, but an obvious wrecking of the property by vandals, and deliberate waste. In a large number of the apartments the plumbing fixtures and pipes were missing, together with parts of the flooring, numerous doors were gone, many windows broken, and much of the window sash and plaster had disappeared, the rear porches of the buildings were rotten and shaky, the roofs leaked, the gutters were gone, stair rails and some of the stairs were missing; ashes, tin cans and rubbish several feet deep covered one of the large basements, and the yard was littered with waste.

G. W. Klower, an architect, testified as to the cost of repairing and replacing this damage. His estimate did not contemplate the cost of putting the building in first class condition, but covered only specific repairs to replace the damage that had been done by the removal of material and the cost of making the porches safe, to replace doors that were gone, fix windows, repair the plaster and to make the place generally livable, without any estimate for decoratin

Paragraph 1) of the rider contained a provision
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to "pay all taxes and special assessments levied on above described
premises from May 1, 1911, to April 30, 1931."

The grievance of the complaint is the alleged failure of
defendants to yield up the premises at the termination of the lease
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place doors that were gone, fix windows, repair the plaster and to

painting or papering. The figures he gave were considerably in excess of the amount of \$1,741.93, which the jury fixed as damages for repairs. No effort was made by defendants to prove that the damage to the property was any different than that disclosed by plaintiffs' evidence, or that such damage was incident to any reasonable use and occupation of the premises. The defenses interposed were rather technical and dealt principally with the quantum of proof required to be presented by plaintiffs to sustain the small amount awarded by the jury. Defendants feel aggrieved because the court permitted Klewer to testify as to the amount of damage for failure to repair, without giving any facts as to the quantity of either labor or material, and they also complain because the court permitted A. H. Smith, manager of the building for plaintiffs, to testify over their objection, which was predicated upon his disqualification by section 2 of the Evidence act (chap. 51, Ill. Rev. Stats., 1939, par. 2.) Klewer and Smith made a detailed inspection of the premises, and in the presence of lessees' representative prepared a detailed list of the repairs required. Defendants' representative was not produced as a witness upon the hearing. The record discloses that on the occasion of this inspection, in 1930, the conditions of the building were substantially identical with those existing at the expiration of the lease, no repair work ~~whatever~~ having been done in the interim. The contention of defendants that before the item of \$1,741.93 can be allowed for damages it was necessary that Klewer, who was an architect of long experience, should break up his estimates for various items of repair down to the exact number and kind of boards, plaster, pipe and other materials required in the repair of this dilapidated building. We consider this contention untenable. A mere glance at the numerous photographs introduced in evidence, when taken together with the undisputed facts of the case, would convince any fair mind that this building was not only neglected and turned over to lessors at the termination of the

painting or papering. The figures he gave were considerably in excess of the amount of \$1,741.93, which the jury fixed as damages for repairs. No effort was made by defendants to prove that the damage to the property was any different than that disclosed by plaintiffs' evidence, or that such damage was incident to any reasonable use and occupation of the premises. The defenses interposed were rather technical and dealt principally with the quantum of proof required to be presented by plaintiffs to sustain the small amount awarded by the jury. Defendants feel aggrieved because the court permitted plaintiff to testify as to the amount of damage for failure to repair, without giving any facts as to the quantity of either labor or material, and they also complain because the court permitted J. H. Smith, manager of the building for plaintiffs, to testify over their objection, which was precluded upon his disqualification by section 4 of the Evidence act (chap. 51, III. Rev. Stats., 1919, par. 2.) However and Smith made a detailed inspection of the premises, and in the presence of lessees' representative prepared a detailed list of the repairs required. Defendants' representative was not produced as a witness upon the hearing. The record discloses that on the occasion of this inspection, in 1919, the conditions of the building were substantially identical with those existing at the expiration of the lease, no repair work whatever having been done in the interim. The contention of defendants that before the term of \$1,741.93 can be allowed for damages it was necessary that plaintiff, who was an architect of long experience, should break up his estimates for various items of repair down to the exact number and kind of boards, plaster, pipe and other materials required in the repair of this dilapidated building. We consider this contention untenable. A mere glance at the numerous photographs introduced in evidence, when taken together with the undisputed facts of the case, would convince any fair mind that this building was not only

lease in a filthy and disapidated condition, but that waste, vandalism and removal of fixtures, plumbing, doors and other accessories rendered the building uninhabitable, and required the expenditure of sums undoubtedly in excess of the amount awarded by the jury. Under the circumstances, we consider it unnecessary to enter into a detailed discussion of the evidence of which defendants complain. There was no countervailing proof upon the subject, and the charge to the jury as to the measure of damages was proper.

There remains only the question of taxes. Under the lease defendants agreed to pay all taxes and special assessments levied on the demised properties from May 1, 1911, to April 30, 1931. The tax levy ordinances in connection with the general 1930 taxes were all passed during the year 1930, and were clearly taxes which the defendants agreed to pay. Defendants argue that the levy of a tax is not made until the county clerk extends the ~~same~~ on his books, and they cite several cases from other jurisdictions not controlling in this state, and two Illinois decisions not concerned with the question of what constitutes a levy, but rather with the validity of certain taxes which could not be enforced because the laws authorizing the levies had been repealed. The court evidently followed People v. P.C.C. & St. L.Ry. Co., 316 Ill. 410, which expresses the correct rule in this state. It appears from the evidence that April 8, 1935, plaintiffs were required to pay installments of a special assessment, in the aggregate sum of \$573.14, for which defendants admit liability, and they also paid the 1930 general taxes on the properties. Under the terms of the lease the lessees were liable for these taxes, and the court so instructed the jury. The total of these sums was \$2,758.07, to which was added interest at the rate of 5% from April 8, 1935, and this aggregate sum, when added to \$1,741.93, the amount of damages to the properties, made up the total of the jury's verdict.

We find no convincing reason for reversing the judgment of the Superior court. It is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

lease in a filthy and dilapidated condition, and that waste, vandalism and removal of windows, doors and other accessories rendered the building uninhabitable, and required the expenditure of sums undoubtably in excess of the amount awarded by the jury. Under the circumstances, we consider it unnecessary to enter into a detailed discussion of the evidence of which defendants complain. There was no countervailing proof upon the subject, and the charge to the jury as to the measure of damages was proper. There remains only the question of taxes. Under the lease defendants agreed to pay all taxes and special assessments levied on the demised properties from May 1, 1911, to April 30, 1912. The tax levy ordinances in connection with the general 1910 taxes were all passed during the year 1910, and were clearly taxes which the defendants agreed to pay. Defendants argue that the levy of a tax is not made until the county clerk extends the same on his books, and they cite several cases from other jurisdictions not controlling in this state, and two Illinois decisions not concerned with the question of what constitutes a levy, but rather with the validity of certain taxes which could not be enforced because the laws authorizing the levies had been repealed. The court evidently follows People v. P.C.C. & St. L.Ry.Co., 216 Ill. 410, which expresses the correct rule in this state. It appears from the evidence that until 8, 1912, plaintiffs were required to pay installments of a special assessment, in the aggregate sum of \$73.14, for which defendants claim liability and they also paid the 1910 general taxes on the properties. Under the terms of the lease the lessees were liable for these taxes, and the court so instructed the jury. The total of these sums was \$2,755.07, to which was added interest at the rate of 5% from April 8, 1912, and this aggregate sum, when added to \$1,741.91, the amount of damages to the properties, made up the total of the jury's verdict. We find no compelling reason for reversing the judgment of the Superior court. It is affirmed.

Scanlan and Sullivan, JJ., concur.

JUDGE JOHN F. WHELAN.

41411

CLAUDE WAYLAND,
Appellee,

v.

CITY OF CHICAGO,
Municipal corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

311 I.A. 247

MR. PRESIDING JUSTICE FRIEND DELIVERED OPINION OF THE COURT.

More than five years ago plaintiff brought suit against the City of Chicago to recover damages for personal injuries sustained as the result of a fall on the sidewalk in front of 4157 Archer avenue, Chicago. The cause has been tried four times. The first trial resulted in a verdict in favor of plaintiff for \$35,000, but the court granted a new trial because the city claimed to have newly discovered evidence which would materially affect the issues. However, no such evidence was presented at the second nor at any subsequent trial. The second trial resulted in a verdict for defendant, which was reversed on appeal because of improper and prejudicial remarks and arguments made to the jury by counsel for the city and other reasons set forth in our opinion. (Wayland v. City of Chicago, 300 Ill. App. 608.) The next trial resulted in a disagreement of the jury. On the fourth trial the jury returned a verdict in favor of plaintiff for \$30,000, for which judgment was entered. This appeal followed.

The essential facts disclose that plaintiff, about 52 years of age at the time of the accident, was employed as manager of the Scott-Burr Stores, a subsidiary of Butler Brothers, with which concern he had been associated since 1930. While walking northeast on Archer avenue on the evening of November 8, 1935, he stepped into a break or cervice in the sidewalk, fell, and was severely injured. Leo Kroll, a grocery man, whose father conducted a store in the same block, saw plaintiff fall, and assisted him. He testified that Wayland was so weak and exhausted that he could go no farther, leaned against a building, shortly became unconscious and was taken

CLAUDE W. HAYWARD,
Appellee,

v.

CITY OF CHICAGO, a
Municipal Corporation,
Appellant.

NINTH CIRCUIT COURT,

COOK COUNTY,

MR. PRESIDING JUDGE FRANK DELIVERED OPINION OF THE COURT.

More than five years ago plaintiff brought suit against the City of Chicago to recover damages for personal injuries sustained as the result of a fall on the sidewalk in front of 417 Archer Avenue, Chicago. The cause has been tried four times. The first trial resulted in a verdict in favor of plaintiff for \$25,000, but the court granted a new trial because the city claimed to have newly discovered evidence which would materially affect the issues. However, no such evidence was presented at the second nor at any subsequent trial. The second trial resulted in a verdict for defendant, which was reversed on appeal because of improper and prejudicial remarks and arguments made to the jury by counsel for the city and other reasons set forth in our opinion. (Hayward v. City of Chicago, 300 Ill. App. 608.) The next trial resulted in a disagreement of the jury. On the fourth trial the jury returned a verdict in favor of plaintiff for \$30,000, for which judgment was entered. This appeal followed.

The essential facts disclose that plaintiff, about 52 years of age at the time of the accident, was employed as manager of the Scott-Burr Stores, a subsidiary of Butler Brothers, with which concern he had been associated since 1930. While walking northeast on Archer Avenue on the evening of November 8, 1935, he stepped into a break or crevice in the sidewalk, fell, and was severely injured. Leo Troll, a grocery man, whose father conducted a store in the same block, saw plaintiff fall, and assisted him. He testified that plaintiff was so weak and exhausted that he could go no farther,

to a hospital. He remained unconscious for about ten days and was not released from the hospital until early in December.

The principal controversy centers around the condition of the sidewalk at the time of the accident. A number of plaintiff's witnesses testified that there was a hole, groove or depression in the sidewalk which caused plaintiff to catch his toe and fall. The city, on the other hand, produced several police officers who examined the sidewalk after the accident and testified that there was no hole, but rather a crevice which was filled with mud and gravel, and that the only defect in the sidewalk was a slight difference in level caused by depression of one of the concrete slabs. It would serve no useful purpose to review this evidence at length, but from a photograph introduced in evidence it clearly appears that the sidewalk was cracked and broken in several places from the curb toward the building line, evidently due to a defective mixture of the concrete. At the curb the concrete appears to be badly cracked and broken, causing a slight sinking of the walk toward the street, which caused the corner of one of the concrete slabs at about the middle of the sidewalk, where plaintiff was walking, to break off, leaving an appreciable hole or depression which was variously described by witnesses as being from two to five inches in depth, and which is plainly discernible in the photograph. Some of defendant's witnesses testified that this hole or depression was covered with dirt, forming a level space at that point and that this dirt and gravel was scraped out before the photograph was taken. This was denied by plaintiff's witnesses, however, some of whom were eyewitnesses to the accident and examined the hole immediately after the occurrence. It was within the province of the jury to determine the facts, and two juries were evidently of opinion that the sidewalk was so defective as to render the city liable for damages.

It is urged by the city that the record of the successive

to a hospital. He remained unconscious for about ten days and was not released from the hospital until early in December. The principal controversy centers around the condition of the sidewalk at the time of the accident. A number of plaintiff's witnesses testified that there was a hole, groove or depression in the sidewalk which caused plaintiff to catch his toe and fall. The city, on the other hand, produced several police officers who examined the sidewalk after the accident and testified that there was no hole, but rather a crevice which was filled with sand and gravel, and that the only defect in the sidewalk was a slight difference in level caused by depression of one of the concrete slabs. It would serve no useful purpose to review this evidence at length, but from a photograph introduced in evidence it clearly appears that the sidewalk was cracked and broken in several places from the curb toward the building line, evidently due to a defective mixture of the concrete. At the curb the concrete appears to be badly cracked and broken, causing a slight sinking of the walk toward the street, which caused the corner of one of the concrete slabs at about the middle of the sidewalk, where plaintiff was walking, to break off, leaving an appreciable hole or depression which was variously described by witnesses as being from two to five inches in depth, and which is plainly discernible in the photograph. Some of defendant's witnesses testified that this hole or depression was covered with dirt, forming a level space at that point and that this dirt and gravel was scraped out before the photograph was taken. This was denied by plaintiff's witnesses, however, some of whom were eyewitnesses to the accident and examined the hole immediately after the occurrence. It was within the province of the jury to determine the facts, and two juries were evidently of opinion that the sidewalk was so defective as to render the city liable for damages. It is urged by the city that the record of the successive

trials in the case discloses that plaintiff's witnesses convicted themselves of perjury on material matters, and that their testimony should be disregarded in its entirety. We have examined the record carefully and find no justification for this charge. It is true that because of a lapse of time between the several trials the testimony of plaintiff's witnesses differed in some respects, but upon the material issues there was no substantial variation.

Another ground urged for reversal is that the verdict of the jury is contrary to the manifest weight of the evidence, and that plaintiff failed to prove by a preponderance of the evidence the allegation of the complaint that he had sustained an injury by stepping into a hole in the sidewalk. It is argued that for this reason defendant's motion for a new trial should have been allowed. From an examination of the rather voluminous record, which we have twice had occasion to consult, we are satisfied that plaintiff stepped into the hole or depression in the sidewalk while walking briskly along thereon, and that his testimony, supported by that of other witnesses who testified in his behalf, warranted the jury in concluding that the city was guilty of negligence in permitting the sidewalk to remain in a defective condition over a long period of time.

The city maintains that Wayland's fall was caused by difference in level between adjoining slabs of the sidewalk, and on oral argument its counsel stressed a line of cases holding that under the circumstances this does not constitute negligence. We have examined these decisions, but do not consider them applicable to the circumstances of this case, because, as hereinbefore set forth, there is abundant evidence to sustain the allegation of the complaint that there was a hole in the sidewalk which caused his injury.

The city's remaining contention is that the injuries sustained by plaintiff do not justify an award of \$30,000. In its statement of facts counsel for the city concede that "as a result

trials in the case discloses that Plaintiff's witnesses convicted themselves of perjury on material matters, and that their testimony should be disregarded in its entirety. We have examined the record carefully and find no justification for this charge. It is true that because of a lapse of time between the several trials the testimony of Plaintiff's witnesses differed in some respects, but upon the material issues there was no substantial variation.

Another ground urged for reversal is that the verdict of the jury is contrary to the manifest weight of the evidence, and that Plaintiff failed to prove by a preponderance of the evidence the allegation of the complaint that he was sustained an injury by stepping into a hole in the sidewalk. It is argued that for this reason defendant's motion for a new trial should have been allowed. From an examination of the rather voluminous record, which we have twice had occasion to consult, we are satisfied that Plaintiff stepped into the hole or depression in the sidewalk while walking briskly along thereon, and that his testimony, supported by that of other witnesses who testified in his behalf, warranted the jury in concluding that the city was guilty of negligence in permitting the sidewalk to remain in a defective condition over a long period of time.

The city maintains that Plaintiff's fall was caused by difference in level between adjoining slabs of the sidewalk, and on oral argument its counsel stressed a line of cases holding that under the circumstances this does not constitute negligence. We have examined these decisions, but do not consider them applicable to the circumstances of this case, because, as hereinbefore set forth, there is abundant evidence to sustain the allegation of the complaint that there was a hole in the sidewalk which caused his

injury.

The city's remaining contention is that the injuries sustained by Plaintiff do not justify an award of \$50,000. In its

of the accident the plaintiff sustained a simple impacted fracture of the metacarpal in the little finger of the right hand, and a fracture in the left occipital region of the head. The head fracture was described by Dr. Kaplan as a contra-coup fracture, meaning that an injury or blow on one side of the head results in a fracture in the opposite side of the skull. The evidence further shows that the injury completely impaired plaintiff's hearing in the right ear and 60% of his hearing in the left ear, and that his senses of taste and smell are greatly impaired." There is undisputed evidence of record that as a result of these injuries he suffered great pain, is extremely nervous, has frequent fainting spells, averaging about one every four or five weeks, and that he has been unable to resume his former occupation as a store manager, for which he received an annual salary of \$3,500.

Dr. Arthur B. Berquist, a member of the staff of University of Illinois Medical School, and connected with the Ravenswood Hospital, attended Wayland upon the injury and for some time thereafter. He testified that his left leg was definitely involved and swollen, necessitating the wearing of an elastic bandage over the entire leg. He said that this condition was permanent, that his deafness was also permanent and that he has not been able to work since the accident. On one occasion he was called to plaintiff's apartment after Wayland had fallen into a faint and collapsed. This condition was said to have occurred frequently. On one occasion he fell in the bathroom and hit the radiator, breaking his nose. When these fainting spells occur his mind becomes blank, and he "passes out." He further testified that plaintiff is subject to fits of crying, and that there is nothing known to medical science which will relieve him of these ailments.

Dr. Alfred N. Murray, an eye, ear, nose and throat specialist, examined plaintiff about three times before the trial and found a total loss of hearing in the right ear and approximately 60% loss in the left. Since the ear drums were normal, Dr. Murray was of opinion

of the accident the plaintiff sustained a simple fractured fracture of the metacarpal in the little finger of the right hand, and a fracture in the left occipital region of the head. The head fracture was described by Dr. Kaplan as a comminuted fracture, meaning that an injury or blow on one side of the head results in a fracture in the opposite side of the skull. The evidence further shows that the injury completely impaired plaintiff's hearing in the right ear and 60% of his hearing in the left ear, and that his sense of taste and smell are greatly impaired. There is uncontroverted evidence of record that as a result of these injuries he suffered great pain, is extremely nervous, has frequent fainting spells, averaging about one every four or five weeks, and that he has been unable to resume his former occupation as a store manager, for which he received an annual salary of \$3,500.

Dr. Arthur B. Bernstein, a member of the staff of University of Illinois Medical School, and connected with the Harewood Hospital, attended Klayland upon the injury and for some time thereafter. He testified that his left leg was definitely involved and swollen, necessitating the wearing of an elastic bandage over the entire leg. He said that this condition was permanent, that his business was also permanent and that he has not been able to work since the accident. On one occasion he was called to plaintiff's apartment after Klayland had fallen into a faint and collapsed. This condition was said to have occurred frequently. On one occasion he fell in the bathroom and hit the radiator, breaking his nose. When these fainting spells occur his mind becomes blank, and he "passes out." He further testified that plaintiff is subject to fits of crying, and that there is nothing known to medical science which will relieve him of these ailments.

Dr. Alfred H. Murray, an eye, ear, nose and throat specialist, examined plaintiff about three times before the trial and found a variety

that this indicated an injury inside plaintiff's head.

Dr. G. B. Fauley made an examination of plaintiff on behalf of an insurance company to determine his status as to permanent disability. He testified that his first examination in April, 1936, showed a partial paralysis, total deafness in the right ear, partial deafness in the left ear, spasticity of the left leg, with impairment of gait, vertigo, dizziness and headaches, and that plaintiff was unable to stand long on his left leg. He entertained hopes of later improvement in plaintiff's condition. On his next examination, in January, 1937, he found plaintiff had been having fainting spells, averaging six in three months. His taste was impaired. His entire left leg, from thigh to ankle, was swollen. There was fixation in his right hand, with the little finger atrophied and paralyzed. He had ankylosis; his gait in the left leg was impaired; he used a cane in walking, and he was still totally deaf in the right ear and partially so in the left. Upon his third examination, in May, 1937, he found that plaintiff was unable to walk any distance. The swelling of his left leg continued. He had headaches and insomnia, tremor of both upper extremities, loss of function in the little finger of the right hand, there was no change in his hearing, taste or smell, and his disability was considered and reported by Dr. Fauley as permanent. Other medical men corroborated these findings.

Counsel for the city stress the fact that in July, 1936, plaintiff drove an automobile from Chicago to Lima, Ohio, a distance of 225 miles, and in so doing was able to sit at the wheel of his car for a trip which occupied the space of 14 hours, and that following this trip he drove from Lima to Canton, Ohio, and on the following day to Cleveland, a distance of 125 miles, which lasted from 8 in the morning until 9 o'clock at night; and it is argued that this would have been impossible if the injuries were as extensive as plaintiff claimed. This argument overlooks the

that this indicated an injury inside plaintiff's head.

Dr. G. B. Farley was an examination of plaintiff on behalf of an insurance company to determine his status as to permanent disability. He testified that his first examination in April, 1936, showed a partial paralysis, total numbness in the right ear, partial deafness in the left ear, spasticity of the left leg, with impairment of gait, vertigo, dizziness and numbness, and that plaintiff was unable to stand long on his left leg. He entertained hopes of later improvement in plaintiff's condition. On his next examination, in January, 1937, he found plaintiff had been having fainting spells, averaging six in three months. His taste was impaired. His entire left leg, from thigh to ankle, was swollen. There was flaccidity in his right hand, with the little finger atrophied and paralyzed. He had numbness in his left leg and foot; it was reported that he could not walk on his left and he was still totally deaf in the right ear and partially so in the left. Upon his third examination, in May, 1937, he found that plaintiff was unable to walk any distance. The swelling of his left leg continued. He had headaches and insomnia, tremor of both upper extremities, loss of function in the little finger of the right hand, there was no change in his hearing, taste or smell, and his disability was considered and reported by Dr. Farley as permanent.

Other medical men corroborated these findings.

Counsel for the city press the fact that in July, 1936, plaintiff drove an automobile from Saint Louis to St. Louis, a distance of 245 miles, and in so doing was able to sit in the front of his car for a trip which occupied the space of 14 hours, and that following this trip he drove from Saint Louis to St. Louis, and on the following day to St. Louis, a distance of 125 miles, which lasted from 8 in the morning until 9 o'clock at night; and it is argued that this would have been impossible if the injuries were as extensive as plaintiff claimed. This argument overlooks the

fact that plaintiff's car had a special device provided in his automobile, which made this sort of driving possible, and also the fact that the undisputed evidence shows his condition to have grown progressively worse from 1936 on. Dr. Fauley, who examined him in the spring of 1936, did not think he was incurable, but subsequent examinations showed that he grew gradually worse, and for the past two years he has not been able to drive at all. The automobile trip from Chicago to Lima, Ohio, consumed fourteen hours, and his average speed was only 16 miles an hour. An examination of the voluminous record leaves no doubt that plaintiff's injuries were of a serious and permanent nature. There is no convincing evidence to the contrary. In addition to the expense to which he was subjected for medical treatment, he suffered a total loss of earning capacity since the accident, which alone exceeds \$15,000. He was still a comparatively young man when injured, and the permanence of his injuries has destroyed his ability to pursue gainful occupation. Under these circumstances, we think the verdict was not excessive.

The cause was fairly tried, and no error is assigned because of the admission or refusal of evidence or instructions to the jury. After four trials plaintiff is entitled to have this litigation terminated. We find no convincing reason for reversal and the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

fact that plaintiff's car had a special device provided in his automobile, which made this sort of driving possible, and also the fact that the undisputed evidence shows his condition to have grown progressively worse from 1936 on. Dr. Feinly, who examined him in the spring of 1936, did not think he was incapable, but subsequent examinations showed that he grew gradually worse, and for the past two years he has not been able to drive at all. The automobile trip from Chicago to Lima, Ohio, consumed fourteen hours, and his average speed was only 15 miles an hour. An examination of the voluminous record leaves no doubt that plaintiff's injuries were of a serious and permanent nature. There is no convincing evidence to the contrary. In addition to the expense to which he was subjected for medical treatment, he suffered a total loss of earning capacity since the accident, which alone exceeds \$12,000. He was still a comparatively young man when injured, and the permanency of his injuries has destroyed his ability to pursue a normal occupation. Under these circumstances, we think the verdict was not excessive.

The case was fairly tried, and no error is assigned because of the admission or refusal of evidence or instructions to the jury. After four trials plaintiff is entitled to have this litigation terminated. We find no convincing reason for reversal and the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Seaman and Sullivan, JJ., concur.

41600

UNIVERSITY STATE BANK,
a corporation,

Appellee,

APPEAL FROM CIRCUIT COURT,

COCK COUNTY.

W. S. KELLY,

Appellant.

311 I.A. 248

MR. PRESIDING JUSTICE FRIEND DELIVERED OPINION OF THE COURT.

The University State Bank, plaintiff herein, had judgment by confession against defendant, W. S. Kelly, on a note dated October 2, 1939, in the sum of \$9,411, payable to the bank. Judgment was entered June 5, 1940. Thereafter defendant moved to vacate the judgment, and presented in support thereof his affidavit and that of his wife, Madeline Kelly. July 3, 1940, the court denied his motion to vacate the judgment and this appeal followed.

The defenses set forth in defendant's motion and affidavit are four-fold: (1) failure of consideration; (2) that the note was procured by fraud; (3) that plaintiff bank made misrepresentations of facts in procuring the execution of the note; and (4) that the judgment is not for a debt bona fide due, as required by chap. 110, par. 174, Sec. 50, subpar. 5, of the Ill. Rev. Stats., 1939.

Defendant's affidavit is quite voluminous and very general in its application to the defenses interposed. He alleges that through his practice of dental surgery in Hyde Park for many years he became active in various commercial and civic organizations in the neighborhood where plaintiff bank is located, and through these activities formed a business and social acquaintanceship with John Hayes, who during his lifetime was vice-president of the bank, by reason whereof he entrusted to the bank the investment of his funds in various forms of security including mortgages and common stock, some of which were issues sponsored by the bank; that at various times the bank lent him money with which

11-10-37

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

RECEIVED

NOV 10 1937

11-10-37

TO THE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

FROM THE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

RE: [illegible]

DATE: [illegible]

SUBJECT: [illegible]

[illegible]

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to purchase these securities, and that he made all his investments through the bank rather than through brokerage firms; that he was unfamiliar with financial affairs, and therefore relied upon the advice of the bank in making investments and that it determined for him the nature and kind of securities to be purchased. Throughout the lengthy affidavit not one single security is mentioned, and in fact the affiant is not even certain as to the amount of money which he says the bank invested for him, but estimates it at approximately \$82,000.

With respect to the defense that there was a failure of consideration, defendant's affidavit and that of his wife alleged that in 1927 he purchased some bonds through the bank, as part of an issue which had been sponsored by the bank, upon Hayes' assurance that the bonds were safe and that the bank would repurchase them at any time "at 99". The bank was evidently quite confident of the security of the bonds, since it lent defendant its own funds with which to purchase them, but aside from that consideration the law is well settled in this state that an agreement by a bank to repurchase its securities under such circumstances is unenforceable.

(Knass v. Madison & Kedzie Bank, 354 Ill. 554.)

With reference to the defenses that the note was procured by fraud, and that plaintiff made misrepresentations of fact in procuring the execution of the note, there is not a single allegation of fact upon which fraud could be predicated. The law is well settled in this state that one who seeks to rescind a contract on ground of fraud must plead facts which if taken to be true constitute fraud. (Dickinson v. Dickinson, 305 Ill. 521, at 527.) The affidavit is devoid of any allegations of fact upon which either of these defenses could well be predicated.

The allegations of plaintiff's affidavit cover the period from approximately 1927 to 1931, including the years of the depression, when the prices of securities were subject to radical changes, and the gravamen of defendant's complaint is that securities

to purchase these securities, and that he made all his investments through the bank rather than through any other means. He was unfamiliar with financial matters, and therefore relied upon the advice of the bank in making investments, and that it determined for him the nature and kind of securities to be purchased. Throughout the January affidavit was made, it was stated, is mentioned, and in fact the affidavit is not even certain as to the amount of money which he says the bank invested for him, but says it was approximately \$25,000.

With respect to the defense that there was a failure of consideration, defendant's affidavit and that of his wife alleged that in 1927 he purchased some bonds through the bank, as part of an issue which had been sponsored by the bank, upon which, it was stated that the bonds were sold and that the bank would guarantee them at any time "at 99". The bank was allegedly under contract to the security of the bonds, since it was defendant's own funds which he purchased them, but with the bank's consideration the law is well settled in this state that an agreement to sell is enforceable if the securities which were purchased are marketable.

(Kraus v. Madison & Granite Bank, 104 Ill. 126.)

With reference to the defense that the note was procured by fraud, and that plaintiff made misrepresentations as to the amount of the proceeds of the note, there is not a single allegation of fact upon which fraud could be established. The law is well settled in this state that one who makes a contract on ground of fraud must show facts which amount to the fraud. (Kraus v. Madison & Granite Bank, 104 Ill. 126.) The law is devoid of any allegation of fact upon which fraud could be established.

The allegations of plaintiff's affidavit, under the facts from approximately 1927 to 1931, including the years of the depression, when the prices of securities were at a low level

which were purchased immediately before the depression depreciated to such an extent over a period of years that they became worthless. It is significant, however, that the note on which judgment was entered was executed by defendant in 1939, approximately 8 years after the period covered by the allegations of his complaint. Defendant does not deny the execution of the note, nor is there any allegation in his affidavit explaining the circumstances under which he executed the note many years after the occurrence of the events about which he complains. No action was taken by him during these many years, and so far as the record discloses he never indicated to the bank after 1931 that he felt in anywise aggrieved by reason of his transactions with the bank. It was not until judgment was confessed that he interposed a motion to vacate the same, and filed a chancery proceeding for an accounting. We are impelled to the conclusion that the execution of the note in 1939 refutes the circumstances set forth in the affidavit, and the only reasonable inference is that he gave the note in settlement of an indebtedness due the bank as the result of his transactions with it over a period of years.

The motion to vacate the judgment was addressed to the sound discretion of the court, and after careful examination of the affidavits in support of the several defenses interposed we have reached the conclusion that they are too vague and general^{in their nature} to justify the vacation of the judgment, especially with the unexplained circumstance that the note was given many years after the acts complained of. The court properly denied defendant's motion to vacate the judgment, and therefore the order of the Circuit court is affirmed.

ORDER AFFIRMED.

Scanlan and Sullivan, JJ., concur.

which were furnished immediately before the deposition mentioned to such an extent over a period of years that they cannot be less. It is significant, however, that the wife on each judgment was entered was executed by defendant in 1937, approximately 6 years after the period covered by the allegations of this complaint, defendant and does not deny the execution of the note, nor is there any allegation in his affidavit explaining the circumstances under which he executed the note many years after the occurrence of the events which he complains. He setting out later in the same document that years, and so far as the record discloses is never limited to the bank after 1937 that he was in any way affected by reason of his transactions with the bank. It was not until judgment was rendered that he introduced a motion to set aside the note, and filed a demurrer proceeding for an accounting. It was implied by the court that the execution of the note in 1937 was for the same purpose as set forth in the affidavit, and that the defendant's intention in that he gave the note in execution of an indebtedness due the bank as the result of his transactions with it over a period of years. The motion to vacate the judgment was supported by the sound discretion of the court, and other material consideration of the affidavit in support of the several motions introduced as the defendant has reached the conclusion that they are not proper and have finally his vacation of the judgment, especially with the undisputed circumstance that the note was given many years after the events complained of. The court properly denied defendant's motion to vacate the judgment, and therefore the order of the circuit court is affirmed.

Sanford and Sullivan, JJ., concur.

41612

PRAIRIE STATE BANK,
Appellee,

v.

HERBERT BAER, EDWARD BAER,
DOROTHY SCHULMAN and
JOHN ANDERMAN,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

311 LA 248²

MR. PRESIDING JUSTICE FRIEND DELIVERED OPINION OF THE COURT.

Prairie State Bank, plaintiff herein, had judgment by confession against defendants upon a note executed by them for \$2,299.59. The statement of claim alleged that there was a balance due on the note of \$199.55, for which they obtained judgment of \$220, including attorneys' fees of \$28.50. Subsequently defendants presented a petition alleging that the note was tainted with usury; that only \$2,000 was paid to them by plaintiff; that the amount of \$299.59 was added to the total of the note as additional charges; and that the \$299.59 is more than 7% upon the amounts due from time to time. The court denied the motion to set aside the judgment and defendants appeal.

The note represented a loan by defendants for alterations and repairs upon real estate belonging to them, under the terms of the "National Housing Act." Since the motion was predicated upon a petition which was considered by the court to be insufficient, we set forth the petition in full:

"Your petitioner, Herbert Baer, respectfully represents to the Court that he is one of the defendants in the above entitled cause; that the said judgment is based upon a note for an alleged amount of \$2,299.59; that a judgment was procured against the defendants for \$220 on June 6, 1940; and that on July 25, your petitioner was served with an execution.

"That said note upon which judgment has been obtained is tainted with usury; in that only \$2,000 was advanced and the amount of \$299.59 was added to the total of said note as additional

PRairie State Bank
Appellee

APPEAL FROM JUDGMENT

COURT OF CHICAGO

HERBERT HARR, EDWARD BARR,
DOROTHY BARRMAN and
JOHN BARRMAN,
Appellants.

311A 348

THE PRESIDING JUSTICE WILL DELIVERED OPINION OF THE COURT.

Prarie State Bank, plaintiff herein, had judgment by

confession against defendants upon a note executed by them for

\$2,299.75. The statement of claim alleged that there was a

balance due on the note of \$199.75, for which they obtained

judgment of \$250, including attorneys' fees of \$28.75. Subse-

quently defendants presented a petition alleging that the note

was tainted with usury; that only \$2,000 was paid to them by

plaintiff; that the amount of \$299.75 was added to the total

of the note as additional charges; and that the \$299.75 is more

than was upon the amounts due from time to time. The court denied

the motion to set aside the judgment and defendants appeal.

The note represented a loan by defendants for alterations

and repairs upon real estate belonging to them, under the terms

of the "National Housing Act." Since the action was prosecuted

upon a petition which was considered by the court to be insuffi-

cient, we set forth the petition in full:

"Your petitioner, Herbert Barr, respectfully represents

to the Court that he is one of the defendants in the above entitled

cause; that said judgment is based upon a note for an alleged

amount of \$2,299.75; that a judgment was procured against the

defendants for \$250 on June 6, 1940; and that on July 27, your

petitioner was served with an execution.

"That said note upon which judgment has been obtained

is tainted with usury; in that only \$2,000 was advanced and the

amount of \$299.75 was added to the total of said note as additional

charges. That said amount of \$299.59 is more than 7 per cent upon the amounts due from time to time. That the defendant has made monthly payments of \$63.88 from March 20th, 1937, up to and including November 2nd, 1939, making a total of \$2,108.04, that was paid on the said note.

"Your petitioner further represents that as the note is tainted with usury and as the statute in such cases provides only for the payment of the principal and as more than the principal of \$2,000 has been paid, there is therefore nothing due to the plaintiff on said note. Therefore your petitioner prays that judgment heretofore entered be set aside, that this petition be allowed to stand as an affidavit of merits and that the defendants be given leave to defend this action on a day to be set by this court. (Signed) HERBERT BAER."

It will be noted that the allegation upon which defendants sought to vacate the judgment merely avers that the note was "tainted with usury; in that only \$2,000 was advanced, and the amount of \$299.59 was added to the total of said note as additional charges. That said amount of \$299.59 is more than 7% upon the amounts due from time to time *** making a total of \$2,108.04 that was paid" from March 20, 1937; and "that as the note is tainted with usury, and as the statute *** provides only for payment of the principal, and as more than the principal of \$2,000 has been paid, there is therefore nothing due the plaintiff." It is apparent that defendants failed to plead the essential facts from which a court could, by reading the petition, determine whether or not a plea of usury was properly set forth. The petition failed to state the place and dates of execution and maturity of the note, the agreed rate of interest, or other circumstances from which the court could fairly determine whether the transaction was usurious. It does not even state that the note was made in Illinois, where the maximum rate of 7% is fixed by statute. Other states allow

charges. That said amount of \$299.79 is more than 7 per cent upon the amount due from time to time. That the defendant has made monthly payments of \$6.66 from March 10th, 1937, up to and including November 1st, 1938, making a total of \$2,198.04, that was paid on the said note.

Your petitioner further represents that as the note is tainted with usury and as the statute in such cases provides only for the payment of the principal and no more than the principal of \$2,000 has been paid, there is therefore nothing due to the plaintiff on said note. Therefore your petitioner prays that judgment heretofore entered be set aside, that this petition be allowed to stand as an affidavit of merits and that the defendants be given leave to defend this action on a day to be set by this court. (Signed) EDWARD HARRIS.

It will be noted that the allegation upon which defendants sought to vacate the judgment merely avers that the note was "tainted with usury; in that only \$2,000 was advanced, and the amount of \$299.79 was added to the total of said note as additional charges. That said amount of \$299.79 is more than 7 per cent amount due from time to time *** making a total of \$2,198.04 that was paid" from March 30, 1937, and "that as the note is tainted with usury, and as the statute *** provides only for payment of the principal, and as more than the principal of \$2,000 has been paid, there is therefore nothing due the plaintiff." It is apparent that defendants failed to plead the essential facts from which a court could, by reading the petition, determine whether or not a plea of usury was properly set forth. The petition failed to state the place and date of execution and maturity of the note, the agreed rate of interest, or other circumstances from which the court could fairly determine whether the transaction was usurious. It does not even state that the note was made in Illinois, where the maximum rate of % is fixed by statute. Other states allow

a greater percentage of interest. We think the omission of these essential averments from the petition rendered it defective.

It is generally recognized, and the authorities hold, that charges for real estate improvement loans, such as insurance, title examination, cost of inspection, appraisal of the real estate, and other items are valid charges which a lender may lawfully require a borrower to pay in addition to the legal rate of interest. (Chicago Title & Trust Co. v. Jensen, 271 Ill. App. 419; Pushee v. Johnson, 166 So. 847; 105 A. L. R. 795, at 810.) On the form of this petition the court was justified in assuming that the item of \$299.59 included some items which were proper charges against the loan, and the mere fact that defendants were required to pay that additional sum did not render it usurious, without a specific showing. In Stanley v. Chicago Trust & Savings Bank, 165 Ill. 295, Goodwin v. Bishop, 145 Ill. 421, and in various other decisions cited by plaintiff the courts enunciate the fundamental rule that petitions to vacate judgments by confession, which fail to set up sufficient facts, should be denied. In the Goodwin case the court said (p. 424): "If a party to a bill in equity desires to set up and rely upon the defense of usury, he must allege the facts showing wherein the usury consist. A general charge of usury in an answer is not sufficient. *** The allegation of the answer may be true, and it by no means follows that the contract between the parties was usurious. *** Where the defense of usury is relied upon, the facts constituting the usury should, as a general rule, be clearly set up in the answer and proved as alleged ***." We think this properly sets forth the general rule in this state.

It is a matter of common knowledge that numerous loans are made under the Federal Housing Act through banks under regulations set up by the Federal government, and before such loans are made and approved, title examination, inspection, appraisal of the real estate

a greater percentage of interest, to which the omission of these essential elements from the petition rendered it defective.

It is generally recognized, and the authorities hold, that charges for real estate improvement loans, such as insurance, title examination, cost of inspection, appraisal of the real estate, and other items are valid charges which a lender may lawfully require a borrower to pay in addition to the legal rate of interest. (Chicago Title & Trust Co. v. Leland, 171 Ill. App. 419; Prushe v. Johnson, 106 Ill. 2d 847; 195 A. 2d 792; at 810.)

On the form of this petition the court was justified in assuming that the item of \$297.50 included some items which were proper charges against the loan, and the mere fact that defendants were required to pay that additional sum did not render it nugatory, without a specific showing. In Stanley v. Chicago Title & Trust Co., 105 Ill. 2d 295, Goodwin v. Leland, 145 Ill. 2d 111, 2d, and in various other decisions cited by plaintiff the courts have made the fundamental rule that petitions to vacate judgments by confession, which fail to set up sufficient facts, should be denied. In the Goodwin case the court said (p. 424): "If a party to a bill in equity desires to set up and rely upon the defense of usury, he must allege the facts showing wherein the usury consists. A general charge of usury in an answer is not sufficient. The allegation of the answer may be true, and it may be found that the contract between the parties was usurious, yet there the defense of usury is relied upon, the facts constituting the usury should, as a general rule, be clearly set up in the answer and proved as alleged." We think this properly sets forth the general rule in this case.

It is a matter of common knowledge that numerous loans are made under the Federal Housing Act through banks under regulations set up by the Federal Government, and before such loans are made and

and other prerequisites must be complied with, which entail expense required to be paid by the borrower. If the item of \$299.59 did not include any such charges it was incumbent upon defendants to so allege. In the absence of any such averment, it cannot be assumed that the item of \$299.59 was all interest; indeed, it is reasonable to assume that part of this sum was properly charged to items which usually arise under such circumstances.

Defendants raise various other points which need not be discussed, in view of our conclusion as to the insufficiency of the petition.

We are of opinion that the court committed no error in denying the petition of defendants. The judgment or order of the Municipal court is affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

and other expenditures made by the defendant, which would be
expense required to be paid by the defendant. If the fact of
\$25.00 did not include any such charges it was incumbent upon
defendants to so allege. In the absence of any such allegation,
it cannot be assumed that the fact of \$25.00 was all inclusive;
indeed, it is reasonable to assume that more than \$25.00 was
properly charged to items which were in fact other than
stanzas.

Defendants raise various other points which need not be
discussed, in view of our conclusion as to the insufficiency of
the petition.
We are of opinion that the court committed no error in
denying the petition of defendants. The judgment or order of
the Municipal court is affirmed.

ATTORNEYS

Geisler and Sullivan, J.L., counsel.

41625

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

ROBERT SCHUESSLER,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

311 I.A. 249

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

May 17, 1940, plaintiff in error, Robert Schuessler, hereinafter referred to as defendant, was tried in the Municipal court for obtaining money by means of false pretenses in two separate cases. Upon his plea of guilty he was sentenced to one year imprisonment in the house of correction in each case, the sentences being ordered to run concurrently. The same day he was committed to the house of correction and has there served both sentences, with the exception of approximately four months with the usual good time allowance. Defendant sued out a writ of error from the Municipal court in cause No. 1706079, and while the matter was here pending his counsel made a motion to consolidate this case with cause No. 1706078, "and that the record, assignment of errors, abstracts and briefs filed and to be filed in this court be taken and considered as the record, assignment of errors, abstracts and briefs on behalf of both causes," being general numbers 1706079 and 1706078. That motion was reserved to hearing, but must herewith be denied because he has prosecuted only one writ of error, and therefore cannot seek the review of any judgment which is not included therein. Although defendant sets forth several different propositions for reversal of the judgment, the principal ground urged is the alleged insufficiency of the information upon which he was charged, which is: "That Robert Schuessler heretofore to-wit: between March 2nd, 1939, and the 16th day of February, 1940, at the City of Chicago, aforesaid, did then and there unlawfully and wilfully with intent to cheat and defraud by means of false

PEOPLE OF THE STATE OF ILLINOIS
Defendant in Error,
v.
ROBERT SCHNESSLER,
Plaintiff in Error.

MR. PRESIDING JUSTICE PRIMO delivered the opinion of the court.
May 17, 1940, plaintiff in error, Robert Schnessler, hereinafter referred to as defendant, was tried in the Municipal Court for obtaining money by means of false pretenses in two separate cases. Upon his plea of guilty he was sentenced to one year imprisonment in the house of correction in each case, the sentences being ordered to run concurrently. The same day he was committed to the house of correction and has there served both sentences, with the exception of approximately four months with the usual good time allowance. Defendant sued out a writ of error from the Municipal Court in cause No. 1700079, and while the matter was here pending his counsel made a motion to consolidate this case with cause No. 1700078, "and that the record, assignment of errors, abstracts and briefs filed and to be filed in this court be taken and considered as the record, assignment of errors, abstracts and briefs on behalf of both causes," being general numbers 1700079 and 1700078. That motion was reserved to hearing, but must herewith be denied because he has prosecuted only one writ of error, and therefore cannot seek the review of any judgment which is not included therein. Although defendant sets forth several different propositions for reversal of the judgment, the principal ground urged is the alleged insufficiency of the information upon which he was charged, which is: "That Robert Schnessler heretofore to-wit: between March and, 1939, and the 10th day of February, 1940, at the City of Chicago, aforesaid, did then and there unlawfully and wilfully with intent to cheat and defraud by means of false

pretenses obtain from Montgomery Ward & Company, Inc., various articles of merchandise, to the value of \$355.00 *** the property of said Montgomery Ward & Co., Inc., with intent then and there unlawfully to cheat and defraud said Montgomery Ward & Co., Inc., in violation of Par. 253, Chap. 38, Smith-Hurd Rev. Statutes of 1937."

It is argued that the information fails to state that Montgomery Ward & Co., who were defrauded, believed the representations to be true or relied upon them, and Defendant's counsel says that this rendered the information fatally defective since under the statute the information must allege that the person defrauded, relying upon the false pretenses, parted with his money. It is undoubtedly true that "in obtaining money by false pretenses the false pretenses^{used} must have been believed and relied upon by the defrauded party and been the means of inducing the victim to part with his property. They must be the direct cause of the loss of the property." (People v. Blume, 345 Ill. 524, 534.) And it may be conceded that this essential element in obtaining money by false pretenses might have been more perfectly alleged in the information. But the information charges, in substance, that defendant did then and there by means of the false pretenses "obtain" the merchandise "from Montgomery Ward & Company, Inc." The information follows, substantially, the language of the statute. In the instant case the defendant did not question the sufficiency of the information in the trial court. Had he done so The People would have had a right to amend the information. He plead guilty to the indictment and at the time this writ of error was filed he had served two-thirds of the time fixed in the sentence. The contention of defendant that we should hold the instant information fatally defective and order his discharge will not be sustained.

It is further urged that the information while speaking of certain merchandise fails to state either the value thereof or the specific dates upon which it was obtained. The information does

pretenses obtain from Montgomery Ward & Company, Inc., various articles of merchandise, to the value of \$352.00 *** the property of said Montgomery Ward & Co., Inc., with intent then and there unlawfully to cheat and defraud said Montgomery Ward & Co., Inc., in violation of Par. 253, Chap. 38, Smith-Brand Rev. Statutes of 1937."

It is argued that the information fails to state that Montgomery Ward & Co., who were defrauded, believed the representations to be true or relied upon them, and defendant's counsel says that this rendered the information fatally defective since under the statute the information must allege that the person defrauded, relying upon the false pretenses, parted with his money. It is undoubtedly true that "in obtaining money by false pretenses the false pretenses^{used} must have been believed and relied upon by the defrauded party and been the means of inducing the victim to part with his property. They must be the direct cause of the loss of the property." (People v. Wilson, 347 Ill. 544, 134,) and it may be conceded that this essential element in obtaining money by false pretenses might have been more perfectly alleged in the information. But the information charges, in substance, that defendant did then and there by means of the false pretenses "obtain" the merchandise "from Montgomery Ward & Company, Inc." The information follows, substantially, the language of the statute. In the instant case the defendant did not question the sufficiency of the information in the trial court. And so the People would have had a right to amend the information. He pleaded guilty to the indictment and at the time this writ of error was filed he had served two-thirds of the time fixed in the sentence. The contention of defendant that we should hold the instant information fatally defective and order his discharge will not be sustained.

It is further urged that the information while speaking of certain merchandise fails to state either in plain thereof or the

lay the time between March 2, 1939, and February 16, 1940, and fixes the value of the merchandise at \$355. Defendant asked for no bill of particulars, nor was any motion made to either quash the information or in arrest of judgment. No bill of exceptions has been preserved and presented to us, indicating what the evidence disclosed, and therefore defendant is not now in position to raise these questions. The time fixed in the information was within the limitation period, and that is sufficient in the absence of any request for further particulars.

While the matter was here pending a motion was made by defendant in error to dismiss the writ and that was also reserved to hearing. It is herewith denied.

No convincing reason has been assigned for disturbing the judgment of the Municipal court and it is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

lay the time between March 2, 1939, and February 10, 1940, and fixes the value of the merchandise at \$375. Defendant asked for no bill of particulars, nor was any motion made to either quash the information or in arrest of judgment. No bill of exceptions has been preserved and presented to us, indicating what the evidence disclosed, and therefore defendant is not now in position to raise these questions. The time fixed in the information was within the limitation period, and that is sufficient in the absence of any request for further particulars.

While the matter was here pending a motion was made by defendant in error to dismiss the writ and that was also reserved to hearing. It is herewith denied.

No convincing reason has been assigned for disturbing the judgment of the Municipal court and it is affirmed.

JUDGMENT AFFIRMED.

Scamman and Sullivan, J., concur.

40929

WALTER S. AUERBACH et al.,
Plaintiffs,

v.

BILTMORE THEATRE CO., a
corporation, et al.,
(Defendants) Appellees,

ANNA A. GOODMAN,
(Plaintiff) Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

311 I.A. 249²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On March 6, 1936, Anna A. Goodman and Walter S. Auerbach, her son, as minority stockholders of Biltmore Theatre Company, a corporation, filed their amended complaint upon behalf of themselves, and also in behalf of all of the stockholders of said Theatre Company, against Biltmore Theatre Company, a corporation, and Nathan Wolf, Sam Wolf, Maurice A. Choynski and Morris Reingold as the majority stockholders and managing officers and directors of the corporation. The amended complaint charges that said defendants, as the majority stockholders and managing officers and directors of said corporation, formed and carried into execution a conspiracy to defraud and injure plaintiffs and other minority stockholders similarly situated. The prayer for relief sought, inter alia, an accounting of the acts and doings of said defendants, and also the appointment of a receiver for said Theatre Company. The answer of said defendants denied all charges of conspiracy and fraud alleged in the amended complaint; denied any mismanagement in the business of the corporation; denied that plaintiff Anna A. Goodman was excluded from participating in the affairs of the corporation or that information had been refused her by said defendants. The cause was referred to Ninian H. Welch, a master in chancery, to take testimony and report the same to the court, together with his conclusions of law and fact. During the hearing of the cause before the master the trial court upon motion

WALTER S. JAMESON et al.
Plaintiffs

v.

BIRMINGHAM THEATRE CO.,
a corporation,
(Defendants)

ANNA A. GOODMAN,
(Plaintiff)

MR. JUSTICE SCAMMAN D LIVERED THE OPINION OF THE COURT.

On March 6, 1936, Anna A. Goodman and Walter S. Jameson, her son, as minority stockholders of Birmingham Theatre Company, a corporation, filed their amended complaint upon behalf of themselves, and also in behalf of all of the stockholders of said Theatre Company, against Birmingham Theatre Company, a corporation, and Nathan Wolf, Sam Wolf, Maurice A. Chagnon and Louis Katschalsky as the majority stockholders and managing officers and directors of the corporation. The amended complaint charges that said defendants, as the majority stockholders and managing officers and directors of said corporation, formed and carried into execution a conspiracy to defraud and injure plaintiff and other minority stockholders similarly situated. The prayer for relief sought, inter alia, an accounting of the acts and omissions of said defendants, and also the appointment of a receiver for said Theatre Company. The answer of said defendants denied all charges of conspiracy and fraud alleged in the amended complaint; denied any mismanagement in the business of the corporation; denied that plaintiff Anna A. Goodman was excluded from participating in the affairs of the corporation or that information had been refused her by said defendants. The cause was referred to William H. Wolf, a master in chancery, to take testimony and report the same to the court, together with his conclusions of law and fact. During the

ALL THE COURT REPORT

OF THE COURT

311 A. 243

of Meyer L. Kence, Michael Kraemer, David Rogoff, Emanuel E. Simon, Frances M. Rohe, Executrix of the Estate of Gus Rohe, deceased, Rose Mandel Wolf, Sarah J. Choynski, Bettie E. Reingold, Sam Rogoff, Lola Simon, Belle Simon and John P. MacKinnon they were allowed to enter their appearance as additional parties defendant and to file their answer to the amended complaint. They then filed an answer to the amended complaint, from which it appears that aside from the original individual defendants named in the cause, Abraham Auerbach, a brother-in-law of Mrs. Goodman, and the heirs at law and next of kin of Sarah Reingold, deceased, said defendants were the owners of all the remaining outstanding stock of the Theatre Company. Said answer also denies that plaintiffs were entitled to the relief sought; denies that they, said defendants, authorized the filing of the amended complaint in their behalf; states that they have been stockholders in said Theatre Company for more than fifteen years last past, in which time they have been personally acquainted with the directors and the officers of the corporation and repeatedly transacted business with them, and that they have absolute confidence in the honesty, integrity and ability of said officers and directors; states that the charges brought by plaintiffs are unfounded in law and in fact, that said proceedings were not brought in good faith, and that the amended complaint should be dismissed. On May 4, 1938, on his own motion, Walter S. Auerbach, plaintiff, was dismissed as a party.

The master, after a lengthy hearing, filed a report recommending that the amended complaint be dismissed for want of equity. The report was confirmed by the trial court and a decree was entered in accordance with the report. Mrs. Goodman appeals from the decree.

The master who heard the evidence and made the report, the late Ninian H. Welch, was an able and upright member of the Chicago bar for many years. The report contains such a clear

of Meyer D. Hance, Daniel Trauer, David Kofsky, Daniel E. Simon, Frances A. Bone, Executive of the Estate of Gus Bone, deceased, Rose Mandel Wolf, Sarah J. Trauer, Bertha E. Weinberg, Sam Kofsky, Julia Simon, Belle Simon and John E. MacKinnon were allowed to enter their appearance as additional parties defendant and to file their answer to the amended complaint. They then filed an answer to the amended complaint, from which it appears that aside from the original individual defendants named in the case, Abraham Warbach, a brother-in-law of Mrs. Goodman, and the heirs at law and next of kin of Sarah Weinberg, deceased, said defendants were the owners of all the remaining outstanding stock of the Theatre Company. Said answer also denies that plaintiffs were entitled to the relief sought; denies that they, said defendants, authorized the filing of the amended complaint in their behalf; states that they have been stock holders in said Theatre Company for more than fifteen years last past, in which time they have been personally acquainted with the directors and the officers of the corporation and repeatedly transacted business with them, and that they have absolute confidence in the honesty, integrity and ability of said officers and directors; states that the charges brought by plaintiffs are unfounded in law and in fact, that said proceedings were not brought in good faith, and that the amended complaint should be dismissed. On May 4, 1938, on his own motion, Father S. Warbach, plaintiff, was dismissed as a party. The master, after a lengthy hearing, filed a report recommending that the amended complaint be dismissed for want of equity. The report was confirmed by the trial court and a decree was entered in accordance with the report. Mrs. Goodman appeals from the decree. The master who heard the evidence and made the report, the late William E. Welch, was an able and upright member of the

statement of the issues and the evidence, and the conclusions of the master, that we set it out practically in toto:

"Master's Report.

"1. * * *

"2. * * * [Refers to allegations of the amended complaint.]

"3. On September 8, 1920, the defendant, Biltmore Theatre Company, became incorporated under the laws of the State of Illinois; the principal asset and only income-yielding property owned by said corporation consists of a building situated upon the premises commonly known and described as 2048 West Division Street, Chicago, Illinois, which building contains a moving picture theater, six stores and five offices; the rents, issues and profits derived from the leasing and operation of said real estate constitute the only source of income of said defendant corporation.

"4. At the time of the filing of the amended complaint, the plaintiffs, Anna A. Goodman and Walter S. Auerbach, owned 818 shares of common capital stock of the defendant corporation out of a total of 4842 shares outstanding; and at said time the defendants owned said common capital stock in the following amounts set opposite their respective names:

<u>Name</u>	<u>Number of Shares</u>
Nathan Wolf	933
Sam Wolf	574
Maurice A. Choynski.....	933
Morris Reingold.....	592

"5. During the pendency of the present proceedings Walter S. Auerbach withdrew as one of the plaintiffs and under date of May 4, 1937, signed an affidavit setting forth the reasons prompting his abandonment of the cause of action alleged in the amended complaint. After the taking of various audits of the books, records and accounts of the Biltmore Theatre Company, said Auerbach arrived at the conviction that the management of the defendant corporation by Nathan Wolf, Sam Wolf, Maurice A. Choynski and Morris Reingold had been honest, efficient and well-intentioned; that said defend-

statement of the issues and the evidence, and the conclusions of the master, that we set it out practically in footnote 1 of the master's report.

"1. * * *
 "2. * * * [Refers to allegations of the amended complaint].
 "3. On September 8, 1930, the defendant, Baltimore Theatre Company, became incorporated under the laws of the State of Illinois; the principal asset and only income-yielding property owned by said corporation consists of a building situated upon the premises commonly known and described as 2048 East Division Street, Chicago, Illinois, which building contains a moving picture theater, six stores and five offices; the rents, issues and profits derived from the leasing and operation of said real estate constitute the only source of income of said defendant corporation.

"4. At the time of the filing of the amended complaint, the plaintiffs, Anna A. Goodman and Walter S. Auerbach, owned 818 shares of common capital stock of the defendant corporation out of a total of 4842 shares outstanding; and at said time the defendants owned said common capital stock in the following amounts set opposite their respective names:

Name	Number of shares
Nathan Wolf	313
Sam Wolf	374
Maurice A. Chodanoff	323
Morris Reinold	322

"5. During the pendency of the present proceedings Walter S. Auerbach withdrew as one of the plaintiffs and under date of May 4, 1937, signed an affidavit setting forth the reasons prompting his abandonment of the cause of action alleged in the amended complaint. After the filing of various audits of the books, records and accounts of the Baltimore Theatre Company, said Auerbach arrived at the conviction that the management of the defendant corporation by Nathan Wolf, Sam Wolf, Maurice A. Chodanoff and Morris Reinold

ants never entered into any conspiracy to appropriate the assets of said corporation for their own use and benefit, and that no fraud had ever been practiced by any of said defendants in the course of exercising their duties as officers and directors of said corporation.

"6. Upon his withdrawal as one of the plaintiffs in the present cause, Walter S. Auerbach transferred all of the shares of common capital stock of the Biltmore Theatre Company theretofore appearing of record in his name to his mother, Anna A. Goodman, who thereafter continued as the sole and surviving plaintiff herein; although the amended complaint purports to have been filed for and on behalf of Anna A. Goodman and all other stockholders similarly situated who may wish to join with her, none of such stockholders took any action in support of the amended complaint.

"7. On August 31, 1937, Meyer L. Kenoe, Michael Kraemer, David Rogoff, Emanuel E. Simon, Frances M. Rohe, executrix of the estate of Gus Rohe, deceased, Rose Mandel Wolf, Sarah J. Choynski, Bettie E. Reingold, Sam Rogoff, Lola Simon, Belle Simon and John P. MacKinnon, constituting all of the remaining stockholders of the defendant corporation (aside from Abraham Auerbach, brother-in-law of the plaintiff Anna A. Goodman) secured leave of court to intervene as parties defendant and filed their answer to the amended complaint declaring that the charges made by the plaintiff, Anna A. Goodman, were unfounded, denied that said plaintiff was entitled to any relief herein and prayed that the amended complaint be dismissed. Said answer further set forth, among other things, that said defendants had been stockholders of the Biltmore Theatre Company for more than fifteen years and as a result of long acquaintance with the defendants, Nathan Wolf, Sam Wolf, Maurice A. Choynski and Morris Reingold, said minority stockholders had absolute confidence in their honesty, integrity and ability as officers and directors of said corporation and were completely

ants never entered into any conspiracy to appropriate the assets of said corporation for their own use and benefit, and that no fraud had ever been practiced by any of said defendants in the course of exercising their duties as officers and directors of said corporation.

"6. Upon his withdrawal as one of the plaintiffs in the present cause, Walter B. Ansbach transferred all of the shares of common capital stock of the Wilmore Theatre Company theretofore appearing of record in his name to his mother, Anna A. Goodman, who thereafter continued as the sole and surviving plaintiff herein; although the amended complaint purports to have been filed for and on behalf of Anna A. Goodman and all other stockholders similarly situated who may wish to join with her, none of such stockholders took any action in support of the amended complaint.

"7. On August 11, 1937, Meyer L. Kohn, Michael Krasner, David Rogoff, Emanuel H. Simon, Frances E. Kohn, executrix of the estate of Gus Kohn, deceased, Rose Mandel Wolf, Sarah J. Choyanski, Bette E. Ringold, Sam Rogoff, Boris Simon and John P. Mackinnon, constituting all of the remaining stockholders of the defendant corporation (aside from Abraham Ansbach, brother-in-law of the plaintiff Anna A. Goodman) secured leave of court to intervene as parties defendant and filed their answer to the amended complaint asserting that the rights made by the plaintiff, Anna A. Goodman, were unfounded, denied that said complaint was entitled to any relief herein and prayed that the amended complaint be dismissed. Said answer further set forth, among other things, that said defendants had been stockholders of the Wilmore Theatre Company for more than fifteen years and as a result of long acquaintance with the defendants, Nathan Wolf, Sam Wolf, Maurice A. Choyanski and Morris Ringold, said minority stockholders had absolute confidence in their honesty, integrity and ability as officers and directors of said corporation and were completely

satisfied with their administration of the affairs of the Biltmore Theatre Company.

"8. Abraham Auerbach, brother-in-law of the plaintiff, Anna A. Goodman, neither supported the plaintiff in the prosecution of the amended complaint nor joined the other minority stockholders in praying that the same be dismissed; said Abraham Auerbach accordingly appears as the only stockholder who maintained a neutral position in regard to the controversy between the plaintiff, Anna A. Goodman and the defendants, Nathan Wolf, Sam Wolf, Maurice A. Choynski and Morris Reingold; all the other stockholders of the Biltmore Theatre Company resisted the charges made by Anna A. Goodman in the amended complaint.

"9. On or about January 15, 1929, Nathan Wolf, Sam Wolf, Maurice A. Choynski, Morris Reingold, Walter S. Auerbach and Anna A. Goodman were elected directors of the defendant corporation; the defendant, Sam Wolf, died during the pendency of the present proceedings and Rose Wolf, his widow, thereupon was elected a member of said board of directors to fill the vacancy caused by his death; the by-laws of the said corporation provide that the board of directors shall be comprised of the same members from year to year unless changed at a subsequent meeting; aside from the election of Rose Wolf as a director to fill the vacancy occasioned by the death of Sam Wolf, no directors were elected for said defendant corporation since January 15, 1929.

"10. On or about January 15, 1929, the directors of the corporation appointed the following persons to serve as officers of said corporation: President, Morris Reingold; Vice-president, Anna A. Goodman; Treasurer, Nathan Wolf; Secretary, Maurice A. Choynski. No officers have been appointed for said corporation since January 15, 1929, and said persons have continued as the duly appointed and acting officers of said corporation down to the present time.

"11. The amended complaint sets forth, among other

associated with their administration of the affairs of the Milwaukee Theatre Company.

"8. Abraham Warbach, brother-in-law of the plaintiff, Anna A. Goodman, neither supported the plaintiff in the prosecution of the amended complaint nor joined the other minority stockholders in praying that the same be dismissed; said Abraham Warbach accordingly appears as the only stockholder who maintains a hostile position in regard to the controversy between the plaintiff, Anna A. Goodman and the defendants, William Wolf, Sam Wolf, Maurice A. Choyanski and Morris Reingold; all the other stockholders of the Milwaukee Theatre Company resisted the charges made by Anna A. Goodman in the amended complaint.

"9. On or about January 15, 1935, William Wolf, Sam Wolf, Maurice A. Choyanski, Morris Reingold, Walter A. Warbach and Anna A. Goodman were elected directors of the defendant corporation; the defendant, Sam Wolf, died during the pendency of the present proceedings and Rose Wolf, his widow, thereupon was elected a member of said board of directors to fill the vacancy caused by his death; the by-laws of the said corporation provide that the board of directors shall be comprised of the same members from year to year unless changed at a subsequent meeting; aside from the election of Rose Wolf as a director to fill the vacancy occasioned by the death of Sam Wolf, no directors were elected for said defendant corporation since January 15, 1935.

"10. On or about January 15, 1935, the directors of the corporation appointed the following persons to serve as officers of said corporation: President, Morris Reingold; Vice-President, Anna A. Goodman; Treasurer, William Wolf; Secretary, Maurice A. Choyanski. No officers have been appointed for said corporation since January 15, 1935, and said persons have continued as the duly appointed and acting officers of said corporation down to the present time.

things, that on or about February 1, 1933, the defendant Nathan Wolf entered into a conspiracy with the defendants, Sam Wolf, Maurice Choynski and Morris Reingold for the unlawful and fraudulent purpose of depriving the plaintiff, Anna A. Goodman and other stockholders of said corporation of their rights and interests as such stockholders, and to exploit and divert its assets for their own private benefit. The amended complaint charged that in carrying into execution said alleged conspiracy the defendants were guilty of various acts of misconduct consisting, among other things, of the following: that said managing stockholders, officers and directors made false and fraudulent entries upon the books, records and accounts of said corporation, and that said corporate records were kept in an improper and disorderly manner; that during the period from February 1, 1933, to May 31, 1935, the defendant, Nathan Wolf, wrongfully took credit upon the accounts of the defendant corporation for various sums of money for miscellaneous items, supplies, repairs and insurance; that the sum of \$360 was improperly charged upon the books of said corporation as a liability owing to the defendant, Maurice A. Choynski, for the rendition of bookkeeping services; that the defendants did not retire junior mortgage bonds issued by said defendant corporation in an equitable manner but preferred themselves over the plaintiff; and that the defendant corporation paid the sum of \$200 to one August Rohe and the further sum of \$300 to the defendants, or either of them, in payment of the junior mortgage bonds without the surrender or cancellation of any bonds.

"12. At the time of the incorporation of the defendant, Biltmore Theatre Company, the amount of its authorized capital stock was fixed at the sum of \$200,000.00, divided into five thousand shares of common stock and twelve hundred and fifty shares of preferred stock; thereafter, on or about May 15, 1925, all of the outstanding shares of preferred stock were surrendered and cancelled in the following manner: under date of May 15, 1925, the defendant corporation

things, that on or about February 1, 1935, the defendant Nathan
Wolf entered into a conspiracy with the defendants, Maurice
Maurice Chovanski and Morris Einigold for the unlawful and fraudulent
purpose of depriving the plaintiff, Anna A. Goodman and other stock-
holders of said corporation of their rights and interests as such
stockholders, and to exploit and divert its assets for their own
private benefit. The amended complaint charged that in carrying
into execution said alleged conspiracy the defendants were guilty
of various acts of misconduct consisting, among other things, of
the following: that said managing stockholders, officers and directors
made false and fraudulent entries upon the books, records and accounts
of said corporation, and that said corporate records were kept in an
improper and disorderly manner; that during the period from February
1, 1935, to May 31, 1935, the defendant, Nathan Wolf, continually
took credit upon the accounts of the defendant corporation for various
sums of money for miscellaneous items, supplies, repairs and insur-
ance; that the sum of \$300 was improperly charged upon the books of
said corporation as a liability owing to the defendant, Maurice A.
Chovanski, for the rendition of bookkeeping services; that the defend-
ants did not retire junior mortgage bonds issued by said defendant
corporation in an equitable manner but preferred themselves over the
plaintiff; and that the defendant corporation paid the sum of \$200
to one August Bone and the further sum of \$300 to the defendants,
or either of them, in payment of the junior mortgage bonds without
the surrender or cancellation of any bonds.
"12. At the time of the incorporation of the defendant,
Biltmore Theatre Company, the amount of its authorized capital stock
was fixed at the sum of \$500,000.00, divided into five thousand
shares of common stock and twelve hundred and fifty shares of prefer-
stock; thereafter, on or about May 15, 1935, all of the outstanding
shares of preferred stock were surrendered and cancelled in the

executed a junior mortgage trust deed upon the said premises owned by it as security for the payment of a series of 680 junior mortgage bonds in the aggregate sum of \$116,000.00; said junior mortgage bonds were distributed to the various stockholders of the defendant corporation in exchange for their shares of preferred stock which were thereupon surrendered and cancelled.

"13. Under date of March 20, 1933, the plaintiff, Anna A. Goodman, entered into a certain written agreement with the defendants, Nathan Wolf, Sam Wolf, Maurice A. Choynski and Morris Reingold and Walter S. Auerbach wherein each of said persons agreed, among other things, to refrain until May 15, 1941, from taking any action, by foreclosure suit or action at law, to enforce payment of any of the junior mortgage bonds owned by each of said persons in the event of a default in the payment of an installment of interest or principal due upon any of said bonds; said agreement further provided, among other things, that in the event the Biltmore Theatre Company would thereafter make any payment of principal or interest upon said junior mortgage bonds, 'such payment or payments shall be distributed to each of the parties *** pro rata according to their respective holdings ***'; and said agreement further provided that in the event of the violation of said agreement, said persons were released from its restrictive provisions.

"14. Anna A. Goodman, the sole and surviving plaintiff in the present suit, contends among other things, that the defendant, Nathan Wolf, along with said Sam Wolf, Morris Reingold and Maurice A. Choynski, violated the terms of said agreement of March 20, 1933, in that said defendants, in managing the affairs of the Biltmore Theatre Company, caused themselves to be preferred over the plaintiff in regard to the amount of payments made on account of junior mortgage bonds.

"The Master finds that as of September 30, 1935, the defendant, Nathan Wolf, had received the total sum of \$1,700.00

executed a Junior mortgage bond upon the said premises owned by it as security for the payment of a series of 600 Junior mortgage bonds in the aggregate sum of \$110,000.00; said Junior mortgage bonds were distributed to the various stockholders of the defendant corporation in exchange for their shares of preferred stock which were thereupon surrendered and cancelled.

"13. Under date of March 30, 1933, the plaintiff, Anna

A. Goodman, entered into a certain written agreement with the defendants, Nathan Wolf, Sam Wolf, Maurice A. Grynwald and Morris Reingold and Walter A. Reingold wherein each of said persons agreed, among other things, to refrain until May 15, 1941, from taking any action, by force or law, to enforce payment of any of the Junior mortgage bonds owned by each of said persons in the event of a default in the payment of an installment of interest or principal due upon any of said bonds; said agreement further provided, among other things, that in the event the Billmore Theatre Company would thereafter make any payment of principal or interest upon said Junior mortgage bonds, such payment or payments shall be distributed to each of the parties hereto pro rata according to their respective holdings ***; and said agreement further provided that in the event of the violation of said agreement, said persons were released from its restrictive provisions.

"14. Anna A. Goodman, the sole and surviving plaintiff in the present suit, contends among other things, that the defendant, Nathan Wolf, along with said Sam Wolf, Morris Reingold and Maurice A. Grynwald, violated the terms of said agreement of March 30, 1933, in that said defendants, in managing the affairs of the Billmore Theatre Company, caused themselves to be preferred over the plaintiff in regard to the amount of payments made on account of Junior mortgage bonds.

"The master finds that as of December 30, 1933, the

on account or in retirement of said junior mortgage bonds owned and held by him; said sum of \$1,700.00 represented 56-2/3% of the total amount of his matured junior mortgage bonds down to and including September 30, 1935; during said period of time Anna A. Goodman received \$1,800.00 from the defendant corporation on account or in retirement of junior mortgage bonds owned and held by her; said sum of \$1,800.00 was equivalent to 56-1/4% of her matured junior mortgage bonds as of September 30, 1935.

"The Master Finds and Concludes that the plaintiff, Anna A. Goodman, has wholly failed to establish that Nathan Wolf or the defendants, Sam Wolf, Morris Reingold and Maurice Choynski preferred themselves over the plaintiff with respect to the payment of interest or principal due on account of their matured junior mortgage bond holdings; it further appears that after September 30, 1935, additional payments were from time to time made to the defendant, Nathan Wolf, and the plaintiff, Anna A. Goodman, on account of their respective junior mortgage bonds, and as a result of said distributions, the plaintiff received payment to the extent of 65% and the defendant, Nathan Wolf, to the extent of 63% of their respective holdings as of February 1, 1937.

"The Master Finds and Concludes that the plaintiff has failed to establish that the retirement of said junior mortgage bonds by the Biltmore Theatre Company was made in an illegal and inequitable manner or that the same constituted wrongful or oppressive conduct on the part of its managing officers and directors, and the plaintiff has wholly failed to prove that the manner of making interest and principal payments on account of said junior mortgage bonds warranted the relief prayed for in the amended complaint.

"The Master Finds and Concludes that neither the defendant, Nathan Wolf, nor the defendants, Sam Wolf, Morris Reingold or Maurice Choynski, as majority stockholders and managing officers and directors of the Biltmore Theatre Company, entered into any manner of con-

on account or in retirement of said junior mortgage bonds owned and held by him; said sum of \$1,700.00 represented 75-2/3% of the total amount of his matured junior mortgage bonds due to and including September 30, 1935; during said period of time Anna A. Goodman received \$1,500.00 from the defendant corporation on account or in retirement of junior mortgage bonds owned and held by her; said sum of \$1,500.00 was equivalent to 75-1/4% of her matured junior mortgage bonds as of September 30, 1935.

"The Master finds and concludes that the plaintiff, Anna A. Goodman, has wholly failed to establish that Nathan Wolf or the defendants, Sam Wolf, Morris Weingold and Maurice Chownski, preferred themselves over the plaintiff with respect to the payment of interest or principal due on account of their matured junior mortgage bond holdings; it further appears that after September 30, 1935, additional payments were from time to time made to the defendant, Nathan Wolf, and the plaintiff, Anna A. Goodman, on account of their respective junior mortgage bonds, and as a result of said distributions, the plaintiff received payment to the extent of 67% and the defendant, Nathan Wolf, to the extent of 67% of their respective holdings as of February 1, 1937.

"The Master finds and concludes that the plaintiff has failed to establish that the retirement of said junior mortgage bonds by the Biltmore Theatre Company was made in an illegal and inequitable manner or that the same constituted wrongful or oppressive conduct on the part of its managing officers and directors, and the plaintiff has wholly failed to prove that the manner of making interest and principal payments on account of said junior mortgage bonds warranted the relief prayed for in the amended complaint.

"The Master finds and concludes that neither the defendant, Nathan Wolf, nor the defendants, Sam Wolf, Morris Weingold or Maurice Chownski, as majority stockholders and managing officers and directors of the Biltmore Theatre Company, acted into any manner of

spiracy, in February, 1933, or at any other time, to exploit the assets of said corporation for their own private benefit to defraud the plaintiff and other stockholders; the plaintiff has failed to establish any fraud on the part of said defendants or that the latter at any time acted in bad faith in performing their duties as officers and directors of the Biltmore Theatre Company, mis-managed its affairs to the detriment of other stockholders, or acted in illegal, wrongful or oppressive manner entitling the plaintiff, Anna A. Goodman, to the relief sought by the amended complaint.

"15. The written agreement entered into under date of March 20, 1933, between said plaintiff and the defendants contained a schedule of junior mortgage bonds owned and held by each of said contracting parties and all of the other stockholders of the Biltmore Theatre Company, including August Rohe; the plaintiff asserts that said schedule is conclusive and must be taken as a complete and accurate list of such bonds which remained outstanding as of March 20, 1933, and further maintains that any bonds omitted from said schedules must be considered as having been paid and cancelled prior to March 20, 1933.

"The Master Finds that the schedule of bonds annexed to said agreement of March 20, 1933, was incorrect in various particulars, including, among others, the following: (1) said schedule omitted bonds number 340 and 341, each in the sum of \$100.00 due May 15, 1933, owned by August Rohe; said bonds, although not scheduled, were unpaid and outstanding as of March 20, 1933; (2) bonds numbered 229, 264 and 368 each in the sum of \$100.00 maturing respectively on the 15th day of May, 1931, 1932 and 1934, owned by Nathan Wolf, were omitted from said schedule although they had not been paid and cancelled prior to March 20, 1933; and (3) said schedule failed to list bond number 346, in the sum of \$1,000.00, due on May 15, 1933, owned by the United States Audit Company. Said bond remained outstanding and unpaid as of March 20, 1933.

agency, in February, 1933, or at any other time, to exploit the assets of said corporation for their own private benefit to the detriment of the plaintiff and other stockholders; the plaintiff has failed to establish any fraud on the part of said defendants or that the latter at any time acted in bad faith in performing their duties as officers and directors of the Illinois Theatre Company, and managed its affairs to the detriment of other stockholders, or acted in illegal, wrongful or oppressive manner violating the plaintiff, Anna A. Goodman, to the relief sought by the amended complaint. "15. The written agreement entered into under date of March 20, 1933, between said plaintiff and the defendants contained a schedule of junior mortgage bonds owned and held by each of said contracting parties and all of the other stockholders of the Illinois Theatre Company, including August Lohr; the plaintiff asserts that said schedule is conclusive and must be taken as a complete and accurate list of such bonds which remained outstanding as of March 20, 1933, and further maintains that any bonds omitted from said schedules must be considered as having been paid and cancelled prior to March 20, 1933.

"The Master finds that the schedule of bonds annexed to said agreement of March 20, 1933, was incorrect in various particulars, including, among others, the following: (1) said schedule omitted bonds number 340 and 341, each in the sum of \$100.00 due May 15, 1933, owned by August Lohr; said bonds, although not secured, were unpaid and outstanding as of March 20, 1933; (2) bonds numbered 228, 264 and 268 each in the sum of \$100.00 maturing respectively on the 15th day of May, 1931, 1932, and 1934, owned by William Wolf, were omitted from said schedule although they had not been paid and cancelled prior to March 20, 1933; and (3) said schedule failed to list bond number 346, in the sum of \$1,000.00, due on May 15, 1933, owned by the United States Trust Company. Said bond remained outstanding and unpaid as of March 20, 1933.

"The Master Further Finds that on or about May 15, 1933, the Biltmore Theatre Company paid the sum of \$200.00 to August Rohe in retirement of junior mortgage bonds number 340 and 341, then owned and held by him, which remained outstanding and unpaid; said payment was made in exchange for the surrender and cancellation of said bonds and constituted a proper disbursement of corporate funds; in November, 1933, June, 1934, and December, 1934, August Rohe received the respective sums of \$68.00, \$68.00 and \$60.00, evidenced by checks of the Biltmore Theatre Company, in payment of installments of interest due and owing on account of outstanding junior mortgage bonds owned by him at said times; said payments of interest were likewise proper disbursements of corporate funds.

"The Master Finds that in June, 1934, February 1, 1935, and March, 1935, the defendant, Nathan Wolf, surrendered bonds number 229, 368, and 246, each for the sum of \$100.00, to the Biltmore Theatre Company for cancellation; said bonds remained outstanding and unpaid at said respective times and their retirement is entitled to be treated as proper disbursement of corporate funds by the Biltmore Theatre Company.

"The Master Further Finds that in July, 1935, the defendant, Nathan Wolf, received the sum of \$800.00 from the defendant corporation in payment of the balance due on account of junior mortgage bond number 303, then owned and held by him; the correct balance due on said bond amounted to the sum of \$800.00 and accordingly said expenditure was proper and did not result in any overpayment, as contended for by the plaintiff, Anna A. Goodman.

"16. The plaintiff, Anna A. Goodman, contends that the said defendants are chargeable with mismanagement of the affairs of said corporation in that interest payments were made on various of said junior mortgage bonds to persons other than the actual owners and holders of the bonds to which said interest installments appertained; the plaintiff alleged that in June, 1935, interest payments were made to Morris Reingold and Nathan Wolf on account of

"The Master further finds that on or about May 12, 1933, the Baltimore Theatre Company paid the sum of \$200.00 to Nathan Wolf in payment of Junior mortgage bonds number 240 and 241, then owned and held by him, which remained outstanding and unpaid; said payment was made in exchange for the surrender and cancellation of said bonds and constituted a proper disbursement of corporate funds; in November, 1931, June, 1934, and December, 1934, August 1935, and March, 1935, the defendant, Nathan Wolf, surrendered bonds number 229, 268, and 246, each for the sum of \$100.00, to the Baltimore Theatre Company for cancellation; said bonds remained outstanding and unpaid at said respective times and their retirement is entitled to be treated as proper disbursement of corporate funds by the Baltimore Theatre Company.

"The Master further finds that in July, 1935, the defendant Nathan Wolf, received the sum of \$800.00 from the defendant corporation in payment of the balance due on account of Junior mortgage bond number 203, then owned and held by him; the correct balance due on said bond amounted to the sum of \$300.00 and accordingly said expenditure was proper and did not result in any overpayment, as contended for by the plaintiff, Anna A. Gordon.

"Id. The plaintiff, Anna A. Gordon, contends that the said defendants are chargeable with mismanagement of the affairs of said corporation in that interest payments were made on various of said Junior mortgage bonds to persons other than the actual owners and holders of the bonds to which said interest installments appertained; the plaintiff alleged that in June, 1935, interest

bonds number 566, 479, 668, and 460 and that said bonds were owned by persons other than said Reingold and Wolf, namely, E. Simon, J. McKinnon and Anna A. Goodman; the defendants introduced evidence tending to explain the propriety of said interest payments; said evidence was to the effect that bonds number 566 and 479 were owned by E. Simon, a relative of Morris Reingold, and that bond number 668 belonged to Morris Reingold rather than J. MacKinnon; it further appears that an interest payment in the sum of \$40.00, received by the defendant Nathan Wolf, in June, 1935, did not appertain to bond number 460, owned and held by Anna A. Goodman, but constituted a payment of an installment of interest due on a junior mortgage bond of which said defendant was the rightful owner.

"17. It does not appear that E. Simon or J. MacKinnon objected to or considered themselves aggrieved by said interest payments made in June, 1935; said Simon and MacKinnon joined in the filing of an answer to the amended complaint denying the plaintiff's right to any relief herein.

"The Master is unable to Find or Conclude from the evidence in the record that the payment of interest upon any of the junior mortgage bonds issued by the Biltmore Theatre Company under date of May 15, 1924, ultimately inured to the benefit of persons other than the actual owners and holders thereof, or resulted in a diversion of corporate funds to improper or unauthorized purposes. The Master finds that the plaintiff has failed to establish that the payment of installments of interest of said junior mortgage bonds in anywise approached fraudulent conduct on the part of the defendants as the managing officers and directors of said corporation, or that their acts in that regard were illegal or oppressive, warranting the appointment of a receiver to take over the assets of the Biltmore Theatre Company or any of the relief sought by the amended complaint.

"18. After the filing of the original complaint herein

bonds number 500, 479, 505, 480 and 481 said bonds were owned by persons other than said defendants, namely, Simon, J. Kinnon and Mrs. A. Goodwin; the defendants introduced evidence tending to explain the propriety of said interest payments; said evidence was to the effect that bonds number 500 and 479 were owned by J. Kinnon, a relative of Morris Kinnold, and that bond number 503 belonged to Morris Kinnold rather than J. Kinnon; it further appears that an interest payment in the sum of \$40.00, received by the defendant Nathan Wolf, in June, 1935, did not pertain to bond number 480, owned and held by Mrs. A. Goodwin, but constituted a payment of an installment of interest due on a junior mortgage bond of which said defendant was the rightful owner.

"17. It does not appear that J. Kinnon or J. Kinnon objected to or considered themselves aggrieved by said interest payments made in June, 1935; said Simon and Kinnon joined in the filing of an answer to the amended complaint denying the plaintiff's right to any relief herein.

"The Master is unable to find or conclude from the evidence in the record that the payment of interest upon any of the junior mortgage bonds issued by the Elmore Theatre Company under date of May 15, 1934, ultimately inured to the benefit of persons other than the actual owners and holders thereof, or resulted in a diversion of corporate funds to improper or unauthorized purposes. The Master finds that the plaintiff has failed to establish that the payment of installments of interest of said junior mortgage bonds in anywise approached fraudulent conduct on the part of the defendants as the managing officers and directors of said corporation, or that their acts in that regard were illegal or oppressive, warranting the appointment of a receiver to take over the assets of the Elmore Theatre Company or any of the relief sought by the amended complaint.

on July 5, 1935, the United States Audit Company under date of August 3, 1935, prepared and issued to the officers and directors of the Biltmore Theatre Company a comprehensive audit of the books, records and accounts of the Biltmore Theatre Company for the period from February 1, 1933, to May 31, 1935; a copy of said audit was furnished to the plaintiff, Anna A. Goodman, prior to the filing of the amended complaint and was introduced in evidence herein as plaintiffs' exhibit 3; it appears from the 'comparative income account,' annexed to said audit as exhibit B thereof, that disbursements were made for the following expenses during the period from August 31, 1932, to May 31, 1935; supplies, \$113.15, insurance, \$715.36, miscellaneous expenses \$205.57, and repairs \$1,000.10; it further appears from the statement of cash receipts and disbursements that disbursements for said expenses from February 1, 1933, to May 31, 1935, was as follows: supplies, \$113.15, miscellaneous expenses \$204.21, repairs \$954.14, and insurance, \$195.24.

"19. After the issuance of said audit of the United States Audit Company, the plaintiff, Anna A. Goodman, filed an amended complaint charging that during the said period from February 1, 1933, to May 31, 1935, the defendant, Nathan Wolf, with the knowledge and consent of Sam Wolf, Maurice Choynski and Morris Reingold, wrongfully took credit upon the books and accounts of the defendant corporation for the respective sums of \$204.27 for miscellaneous items, the sum of \$113.15 for supplies, \$954.14 for repairs and \$715.36 for insurance; the plaintiff, Anna A. Goodman, further contends that the corporate records were improperly kept in that invoices and cancelled checks were not available to substantiate entries appearing upon the corporate books as disbursements for operating expenses.

"The Master finds that the plaintiff has failed to establish that the defendant, Nathan Wolf, or any of the other defendants herein, improperly took credit upon the corporate books for miscel-

on July 5, 1935, the United States Audit Company under date of August 1, 1935, prepared and issued to the defendant and directors of the Baltimore Theatre Company a comprehensive audit of the books, records and accounts of the Baltimore Theatre Company for the period from February 1, 1933, to May 31, 1935; a copy of said audit was furnished to the plaintiff, Anna A. Goodman, prior to the filing of the amended complaint and was introduced in evidence herein as 'plaintiff's exhibit 1'; it appears from the comparative income account, annexed to said audit as exhibit B thereof, that disbursements were made for the following expenses during the period from August 31, 1933, to May 31, 1935: supplies, \$113.15; insurance, \$75.36; miscellaneous expenses \$204.27, and repairs \$1,000.10; it further appears from the statement of cash receipts and disbursements that disbursements for said expenses from February 1, 1933, to May 31, 1935, was as follows: supplies, \$113.15; miscellaneous expenses \$204.27, repairs \$954.14, and insurance, \$95.24.

"19. After the issuance of said audit of the United States Audit Company, the plaintiff, Anna A. Goodman, filed an amended complaint charging that during the said period from February 1, 1933, to May 31, 1935, the defendant, Nathan Wolf, with the knowledge and consent of Sam Wolf, Maurice Chonowski and Morris Reingold, wrongfully took credit upon the books and accounts of the defendant corporation for the respective sums of \$204.27 for miscellaneous items, the sum of \$113.15 for supplies, \$954.14 for repairs and \$75.36 for insurance; the plaintiff, Anna A. Goodman, further contends that the corporate records were improperly kept in that invoices and cancelled checks were not available to substantiate entries appearing upon the corporate books as disbursements for operating expenses.

"The Master finds that the plaintiff has failed to establish that the defendant, Nathan Wolf, or any of the other defendants

laneous expenses, supplies, repairs or insurance, as alleged in the amended complaint; practically all of the disbursements for operating expenses challenged by the plaintiff were substantiated by the presentation and introduction in evidence of numerous invoices and cancelled corporate checks which corresponded with entries appearing in the disbursement book of the Biltmore Theatre Company; said invoices and cancelled checks, together with explanatory testimony offered by the defendants herein, amply support the various disbursement entries appearing upon the corporate books and records for the period from February 1, 1933, to May 31, 1935, for miscellaneous expenses, supplies and repairs in the respective aggregate amounts of \$204.27, \$113.15 and \$956.14; said expenditures are itemized in schedules 1, 2 and 3 of the report of the books, records and accounts of said defendant corporation prepared by Frank J. Janowiak, introduced in evidence as defendants' exhibit 1 of April 13, 1937.

"20. The invoices and cancelled checks in the possession of the Biltmore Theatre Company and the supplementary testimony offered by the defendants, substantiate disbursement entries upon the corporate books and records for insurance and indicate that the total sum of \$715.36 was expended for that purpose, as follows: "195.24 from February 1, 1933, to May 31, 1935, the sum of \$520.12 from October 1, 1932, to February 1, 1933; said disbursements are itemized in schedule 4 annexed to the said audit of Frank J. Janowiak

"21. The plaintiff, Anna A. Goodman, contends that the defendants, in order to induce her to sign said agreement of March 20, 1933, promised and agreed to install a new bookkeeping system for the Biltmore Theatre Company and to employ a regular full-time bookkeeper to keep the corporate books and records.

"22. The Master finds that at the meeting between the plaintiff, Anna A. Goodman, and the defendants, which occurred at the time of the signing of said agreement of March 20, 1933, an informal discussion ensued regarding the method of keeping the books and records of the Biltmore Theatre Company; at said conference the

Jameson expenses, supplies, repairs or insurance, as alleged in the amended complaint; practically all of the disbursements for operating expenses claimed by the Plaintiff were substantiated by the presentation and introduction in evidence of numerous invoices and cancelled corporate checks which corresponded with entries appearing in the disbursement book of the Baltimore Theatre Company; said invoices and cancelled checks, together with supplementary testimony offered by the defendants herein, amply support the various disbursement entries appearing upon the corporate books and records for the period from February 1, 1933, to May 31, 1933, for miscellaneous expenses, supplies and repairs in the respective aggregated amounts of \$204.77, \$113.15 and \$90.14; said disbursements are itemized in schedules 1, 2 and 3 of the report of the books, records and accounts of said defendant corporation prepared by Frank J. Jameson, introduced in evidence as defendants' exhibit 1 of April 15, 1937.

"20. The invoices and cancelled checks in the possession of the Baltimore Theatre Company and the supplementary testimony offered by the defendants, substantiate disbursement entries upon the corporate books and records for insurance and indicate that the total sum of \$712.30 was expended for that purpose, as follows: \$195.24 from February 1, 1933, to May 31, 1933, the sum of \$230.12 from October 1, 1932, to February 1, 1933; said disbursements are itemized in schedule 4 annexed to the said audit of Frank J. Jameson.

"21. The Plaintiff, Anna A. Goodman, contends that the defendants, in order to induce her to sign said agreement of March 20, 1933, promised and agreed to install a new bookkeeping system for the Baltimore Theatre Company and to employ a regular full-time bookkeeper to keep the corporate books and records.

"22. The Master finds that at the meeting between the Plaintiff, Anna A. Goodman, and the defendants, which occurred at the time of the signing of said agreement of March 20, 1933, an informal discussion ensued regarding the method of keeping the books and

suggestion was made and approved by the parties present to the effect that a new set of books should be purchased for the defendant corporation and installed under the supervision of one Reilly, an auditor connected with the United States Audit Company, who had previously rendered accounting services on behalf of the plaintiff and was acceptable to her.

"The Master Finds that subsequent to the execution of said written agreement of March 20, 1933, a new set of books for the defendant corporation was accordingly purchased and set up by the defendant Maurice A. Choynski, under the supervision of said Reilly, of the United States Audit Company; the corporate books and records consisted, among other things, of a journal, ledger and cash receipts and disbursements book; in addition thereto the defendants, Morris Reingold and Nathan Wolf, in the regular course of superintending the collection of rentals for the Biltmore Theatre Company, kept a tenants' record book, receipt stubs and complete memoranda of all rental collections.

"The Master Finds that the plaintiff has failed to prove by a preponderance of the evidence that the defendants at any time understood or agreed that a regular bookkeeper would be employed on a full-time basis to make daily entries upon the corporate books and records of the Biltmore Theatre Company.

"23. The plaintiff, Anna A. Goodman, contends that the record of rental collections kept by the Biltmore Theatre Company was maintained in an incomplete and disorderly fashion; it appears that a comprehensive statement of rent collected from each of the lessees occupying the theatre, stores and offices in the building owned by the defendant corporation, during the period from February, 1933, to May, 1935, is set forth as schedule 3 of the audit of the corporate books and accounts prepared by the United States Audit Company; Frank Janowiak, an auditor, likewise prepared detailed statements of the amount of rentals collected from each of said tenants as disclosed by entries appearing upon the books, records

suggestion was made and approved by the parties present to the effect that a new set of books should be purchased for the defendant corporation and installed under the supervision of one Kelly, an auditor connected with the United States Audit Company, who had previously rendered accounting services on behalf of the plaintiff and was acceptable to her.

"The Master finds that subsequent to the execution of said written agreement of March 20, 1933, a new set of books for the defendant corporation was accordingly purchased and set up by the defendant Maurice A. Chynowski, under the supervision of said Kelly, of the United States Audit Company; the corporate books and records consisted, among other things, of a journal, ledger and cash receipts and disbursements book; in addition thereto the defendants Morris Reinhold and Nathan Wolf, in the regular course of superintending the collection of rentals for the Baltimore Theatre Company, kept a tenants' record book, receipt stubs and complete records of all rental collections.

"The Master finds that the plaintiff has failed to prove by a preponderance of the evidence that the defendant at any time understood or agreed that a regular bookkeeper would be employed on a full-time basis to make daily entries upon the corporate books and records of the Baltimore Theatre Company.

"23. The plaintiff, Mrs. A. Goodman, contends that the record of rental collections kept by the Baltimore Theatre Company was maintained in an incomplete and disorderly fashion; it appears that a comprehensive statement of rent collected from each of the lessees occupying the theatre, stores and offices in the building owned by the defendant corporation, during the period from February, 1933, to May, 1935, is set forth as schedule 3 of the audit of the corporate books and accounts prepared by the United States Audit Company; Frank Janowski, an auditor, likewise prepared detailed statements of the amount of rentals collected from each of said

and accounts of the Biltmore Theatre Company; said latter statements were introduced in evidence herein as defendants' exhibit 45 to 54 of April 13, 1937.

"24. Each of the twelve lessees of the Biltmore Theatre Company had written leases which specified their respective rental charges; from time to time during the period from February, 1933, to May, 1935, it became necessary to make adjustments and reductions in the amount of rentals called for in said leases and on many occasions the monthly rental due from a particular lessee was paid out in four or five small installments; the amount of the monthly rental charge due from each of the lessees and a complete and detailed record of the rental receipts were kept by the defendant, Nathan Wolf, in a tenants' record book.

"25. The amount of rentals collected by the defendants, Nathan Wolf and Morris Reingold, from each of said various tenants, was also recorded upon the stubs of the rent receipt books and upon memoranda consisting of sheafs of paper, which were introduced in evidence as Plaintiffs' exhibits 1 to 3 of November 12, 1937, and Plaintiffs' exhibit 1 of September 20, 1937; since 1935 duplicate rental receipts have been retained to evidence collections; one of such duplicate rental receipt books, evidencing collections of rentals from September 16, 1935, to December 14, 1935, was introduced in evidence herein as Defendants' Exhibit 2 of September 20, 1937.

"The Master Finds that Maurice A. Choyinski acted as the bookkeeper for the Biltmore Theatre Company and maintained its books, records and accounts according to instructions given by said Reilly of the United States Audit Company; Reilly examined and checked said corporate records each month during the period from May, 1933, to May, 1935.

"The Master Finds and Concludes that receipt of income and all disbursements of corporate funds were fully and completely recorded upon said books, records and accounts of the Biltmore Theatre

and accounts of the Baltimore Theatre Company; said latter statements were introduced in evidence herein as defendants' exhibits 45 to 54 of April 13, 1937.

"24. Each of the twelve lessees of the Baltimore Theatre Company had written leases which specified their respective rental charges; from time to time during the period from February, 1933, to May, 1935, it became necessary to make adjustments and reductions

in the amount of rentals called for in said leases and on many occasions the monthly rental due from a particular lessee was paid out in four or five small installments; the amount of the monthly rental charge due from each of the lessees and a complete and detailed record of the rental receipts were kept by the defendant, Nathan Wolf, in a tenants' record book.

"25. The amount of rentals collected by the defendants, Nathan Wolf and Morris Reinhold, from each of said various tenants, was also recorded upon the stubs of the rent receipt books and upon memoranda consisting of sheets of paper, which were introduced in evidence as plaintiffs' exhibits 1 to 3 of November 12, 1935, and plaintiffs' exhibit 1 of September 20, 1937; since 1935 duplicate rental receipts have been retained to evidence collections; one of such duplicate rental receipt books, evidencing collections of rentals from September 10, 1935, to December 14, 1935, was introduced in evidence herein as defendants' Exhibit 2 of September 20, 1937.

"The Master finds that Maurice A. Choyanski acted as the bookkeeper for the Baltimore Theatre Company and maintained its books, records and accounts according to instructions given by said Reilly of the United States Audit Company; Reilly examined and checked said corporate records each month during the period from May, 1933, to May, 1935.

"The Master finds and concludes that receipts of income and all disbursements of corporate funds were fully and completely recorded

Company and honestly kept; said corporate records, although apparently not maintained according to the best accounting practice, were nevertheless complete, reasonably adequate and adapted to the type of business carried on by said corporation, namely, the operation of one improved parcel of business property involving the collection of monthly rentals from twelve lessees; said records and accounts substantially reflect all items of receipt and disbursement and are corroborated by supporting invoices and cancelled checks. No fraud in that respect is shown by record.

"26. No bond register was maintained as a part of the bookkeeping system of the Biltmore Theatre Company from February, 1933, to May, 1935, although defendants' witness Janowiak testified that a bond register should have been installed. The plaintiff, Anna A. Goodman, has failed to establish that said omission was due to any wrongful motive on the part of any of the defendants or resulted in any injury to the stockholders; all expenditures of corporate funds on account of said junior mortgage bonds were properly made and disbursements in retirement of such bonds were accompanied by their surrender and cancellation; corporate checks presently issued in payment of interest and principal due on any of said bonds are marked with the number identifying the particular bonds to which said payments are applicable.

"The Master Finds and Concludes that the books, records and accounts of the Biltmore Theatre Company were kept and maintained by the defendants in an honest and reasonably complete and intelligible manner; and the plaintiff, Anna A. Goodman, has failed to establish that said corporate records contained any false or fraudulent entries and has failed to establish that any of the defendants acted improperly in the matter of handling of corporate accounts.

"27. Pursuant to the request and with the acquiescence of the other officers and directors, the defendant, Maurice A. Choynski, devoted approximately three hours each week in the performance of bookkeeping services for the Biltmore Theatre Company;

Company and honestly kept; said corporate records, although apparently not maintained according to the best accounting practices, were nevertheless complete, reasonably adequate and adapted to the type of business carried on by said corporation, namely, the operation of one improved parcel of urban property involving the collection of monthly rental from twelve lessees; said records and accounts substantially reflect all items of receipt and disbursement and are corroborated by supporting invoices and cancelled checks. No fraud in that respect is shown by record.

"26. No bond register was maintained as a part of the bookkeeping system of the Baltimore Theatre Company from February, 1933, to May, 1935, although defendants, witness Janowski testified that a bond register should have been installed. The Plaintiff, Anna A. Goodman, has failed to establish that said omission was due to any wrongful motive on the part of any of the defendants or resulted in any injury to the stockholders; all expenditures of corporate funds on account of said junior mortgage bonds were properly made and disbursements in retirement of such bonds were accompanied by their surrender and cancellation; corporate checks presently issued in payment of interest and principal due on any of said bonds are marked with the number identifying the particular bonds to which said payments are applicable.

"The Master finds and concludes that the books, records and accounts of the Baltimore Theatre Company were kept and maintained by the defendants in an honest and reasonably complete and intelligible manner; and the Plaintiff, Anna A. Goodman, has failed to establish that said corporate records contained any false or fraudulent entries and has failed to establish that any of the defendants acted improperly in the matter of handling of corporate accounts.

"27. Pursuant to the request and with the acquiescence of the other officers and directors, the defendant, Maurice A. Chojnaski, devoted approximately three hours each week in the per-

on August 31, 1934, the sum of \$360.00, representing compensation for said services at the rate of \$5.00 per week for the preceding seventy-two weeks, was charged upon the corporate records as due and owing to Choynski; said sum of \$360.00 had not been paid to Choynski at the time of the hearing held herein; the defendants, Nathan Wolf and Morris Reingold, granted Choynski the authority to take credit for said sum of \$360.00 in recognition of the bookkeeping services which were performed for the benefit of the Biltmore Theatre Company; it does not appear that there had been any specific agreement to pay Choynski the sum of \$5.00 per week at any time prior to August 31, 1934, nor was any corporate resolution formally adopted by the board of directors approving said allowance.

"28. Under date of March 20, 1933, Anna A. Goodman and Walter S. Auerbach entered into a certain written agreement with Maurice A. Choynski, Morris Reingold, Nathan Wolf and Sam Wolf, wherein it was provided, among other things, that each of said persons would cast their vote, as stockholders and directors of the Biltmore Theatre Company, for the election of Choynski as Secretary, Reingold as President and Goodman as Vice-President; said agreement further provided that each of said persons should serve as said officers without compensation; the plaintiff, Anna A. Goodman, contends that the defendant, Maurice A. Choynski, acted as secretary of the Biltmore Theatre Company at the time he rendered said bookkeeping services and is accordingly not entitled to receive any compensation therefor.

"29. The record does not disclose that bookkeeping services were to be rendered by the said defendant, Maurice A. Choynski, in his capacity of secretary, and the Master Finds that the bookkeeping services rendered by the defendant, Maurice A. Choynski, inured to the benefit of the Biltmore Theatre Company and were performed outside of the scope of his duties as an officer and director of said corporation; and that the sum of \$5.00 per week

on August 31, 1934, the sum of \$500.00, representing compensation for said services at the rate of \$7.00 per week for the preceding seventy-two weeks, was charged upon the corporate records as due and owing to Choyanski; said sum of \$500.00 had not been paid to Choyanski at the time of the hearing held herein; the defendants, Nathan Wolf and Morris Reinhold, granted Choyanski the authority to take credit for said sum of \$500.00 in recognition of the bookkeeping services which were performed for the benefit of the Baltimore Theatre Company; it does not appear that there had been any specific agreement to pay Choyanski the sum of \$7.00 per week at any time prior to August 31, 1934, nor was any corporate resolution formally adopted by the board of directors approving said allowance.

"28. Under date of March 20, 1933, Anna A. Goodman and Walter E. Auerbach entered into a certain written agreement with Maurice A. Choyanski, Morris Reinhold, Nathan Wolf and Sam Wolf, wherein it was provided, among other things, that each of said persons would cast their vote, as stockholders and directors of the Baltimore Theatre Company, for the election of Choyanski as Secretary, Reinhold as President and Goodman as Vice-President; said agreement further provided that each of said persons should serve as said officers without compensation; the Plaintiff, Anna A. Goodman, contends that the defendant, Maurice A. Choyanski, acted as secretary of the Baltimore Theatre Company at the time he rendered said bookkeeping services and is accordingly not entitled to receive any compensation therefor.

"29. The record does not disclose that bookkeeping services were to be rendered by the said defendant, Maurice A. Choyanski, in his capacity of secretary, and the record does not disclose that the bookkeeping services rendered by the defendant, Maurice A. Choyanski, inured to the benefit of the Baltimore Theatre Company and were performed outside of the scope of his duties as an officer and

was not an unreasonable charge for the type of services so rendered.

"The Master Finds and Concludes that said sum of \$360.00, allowed as compensation to Maurice A. Choynski, was not unreasonable and constituted a matter of corporate policy on the part of the managing officers and directors which was free from any wrongdoing; said allowance does not constitute oppressive, illegal or fraudulent conduct entitling the plaintiff, Anna A. Goodman, to any equitable relief in this proceeding.

"30. On May 1, 1934, the cash account of the Biltmore Theatre Company was credited with the sum of \$167.82; prior to said date said sum of money had belonged to the Biltmore Theatre Company and had been temporarily deposited, as a matter of convenience in the bank account of the Vision Theatre, maintained at the United American Trust & Savings Bank, prior to May 1, 1934, said bank closed its doors and ceased doing business and said sum of \$167.82 was lost to the Biltmore Theatre Company.

"31. The plaintiff, Anna A. Goodman, contends that the board of directors of the Biltmore Theatre Company at no time adopted a resolution permitting the deposit of its corporate funds in said bank account of the Vision Theatre; and the plaintiff further maintains that the defendants should be required to reimburse the Biltmore Theatre Company for said sum of \$167.82.

"32. During the period of five or six years prior to the closing of the United American Trust and Savings Bank the officers of the Biltmore Theatre Company customarily made deposits of small rental collections during each month in said bank account of the Vision Theatre; said practice had originated at a time when the plaintiff, Anna A. Goodman, owned approximately a 'one-sixth interest' in the Vision Theatre which she disposed of on or about March 20, 1933; at the end of each month the funds of the Biltmore Theatre Company, which had accumulated in said account, were withdrawn and deposited in the bank account of the Biltmore Theatre Company in the

was not an unreasonable charge for the type of services so

rendered.

"The master finds and concludes that said sum of \$100.00 allowed as compensation to Maurice A. Choyenski, was not unreasonable and constituted a matter of corporate policy on the part of the managing officers and directors which was free from any wrongdoing; said allowance does not constitute oppressive, illegal or fraudulent conduct entitling the plaintiff, Anna A. Goodman, to any equitable relief in this proceeding.

"30. On May 1, 1934, the cash account of the Baltimore Theatre Company was credited with the sum of \$107.82; prior to said date said sum of money had belonged to the Baltimore Theatre Company and had been temporarily deposited, as a matter of convenience in the bank account of the Vision Theatre, maintained at the United American Trust & Savings Bank, prior to May 1, 1934, said bank closed its doors and ceased doing business and said sum of \$107.82 was lost to the Baltimore Theatre Company.

"31. The plaintiff, Anna A. Goodman, contends that the board of directors of the Baltimore Theatre Company at no time adopted a resolution permitting the deposit of its corporate funds in said bank account of the Vision Theatre; and the plaintiff further maintains that the defendants should be required to reimburse the Baltimore Theatre Company for said sum of \$107.82.

"32. During the period of five or six years prior to the closing of the United American Trust and Savings Bank the officers of the Baltimore Theatre Company customarily made deposits of rental collections during each month in said bank account of the Vision Theatre; said practice had originated at a time when the plaintiff, Anna A. Goodman, owned approximately a one-sixth interest in the Vision Theatre which she disposed of on or about March 20, 1933; at the end of each month the funds of the Baltimore Theatre Company, which had accumulated in said account, were withdrawn and

National Bank of the Republic; the United American Trust & Savings Bank was more conveniently located for the making of small daily deposits of rentals and said funds were accordingly kept in said account temporarily until they could be placed in the regular corporate bank account.

"The Master Finds and Concludes that the practice of making said temporary deposits of small rental collections of the Biltmore Theatre Company while irregular, is not attributable to any fraud or wrongdoing on the part of any of the defendants; said deposits were temporary in nature and for purposes of safe-keeping; the defendants should not be required to reimburse the Biltmore Theatre Company for said sum of \$167.82.

"33. After the filing of the amended complaint, the defendants as managing officers of the Biltmore Theatre Company, caused said corporation to pay out the sum of \$650.00 to the United States Audit Company for the preparation of its audit of the books, records, and accounts of the Biltmore Theatre Company, and to pay the sum of \$500.00 on account of attorney's fees of counsel employed to defend the present litigation; the Biltmore Theatre Company had paid various other sums of money for stenographic charges and other expenses incidental to the defense of the present suit.

"The Master Finds and Concludes that the defendants, as the managing officers of the Biltmore Theatre Company, were entitled to employ attorneys to represent and defend the defendant corporation and to resist the charges made by the plaintiff, Anna A. Goodman, in the amended complaint; and said defendants were likewise authorized to enlist the services of auditors and accountants^{to} prepare the audits introduced in evidence herein and to pay reasonable compensation therefor.

"The Master Finds and Concludes that the plaintiff, Anna A. Goodman, has failed to establish that any of the defendants, together constituting the majority stockholders and managing officers and directors of the Biltmore Company, at any time entered into a

National Bank of the Republic; the United American Bank & Savings Bank was more conveniently located for the banking and all daily deposits of rents and all funds were deposited in said account temporarily until they could be placed in the other corporate bank account.

"The master finds and concludes that the plaintiff's said temporary deposits of small rental collections of the Baltimore Theatre Company while in custody, is not attributable to any fraud or wrongdoing on the part of any of the defendants; said deposits were temporary in nature and for purposes of safe-keeping; the defendants should not be required to reimburse the Baltimore Theatre Company for said sum of \$187.82.

"33. That the filing of the second complaint, the defendants as managing officers of the Baltimore Theatre Company, caused said corporation to pay out the sum of \$600.00 to the United States Audit Company for the preparation of its audit of the books, records, and accounts of the Baltimore Theatre Company, and to pay the sum of \$200.00 on account of attorney's fees of counsel employed to defend the present litigation; the Baltimore Theatre Company had paid various other sums of money for stenographic clerks and other expenses incidental to the defense of the present suit.

"The master finds and concludes that the defendants, as the managing officers of the Baltimore Theatre Company, were entitled to employ attorneys to represent and defend the defendant corporation and to resist the charges made by the plaintiff, James A. Goodman, in the amended complaint; and said defendants were likewise authorized to enlist the services of auditors and accountants to prepare the audit introduced in evidence herein and to pay reasonable compensation therefor.

"The master finds and concludes that the plaintiff, James A. Goodman, has failed to establish that any of the defendants, together constituting the majority stockholders and managing officers

conspiracy to defraud the plaintiff or any other stockholders of their rights and interests in said corporation; and that the plaintiff has wholly failed to establish that any of said defendants were guilty of fraud or illegal or oppressive conduct, or that any of their acts in superintending the management of corporate affairs warranted the appointment of a receiver for the Biltmore Theatre Company or entitled the plaintiff to any of the equitable relief sought in the amended complaint.

"In Conclusion, the Master Recommends the entry of a decree in accordance with the findings hereinabove set out, dismissing the amended complaint for want of equity."

Mrs. Goodman, alone, filed objections to the master's report. During the hearing before the trial court upon the exceptions to the master's report Mr. Leviton, at the opening of his argument on behalf of defendants, addressed Mr. Van Ness, one of the attorneys for Mrs. Goodman, as follows: "I really would like to have you answer one question. Do you contend that anywhere in this record there has been proof of any one fraudulent disbursement?" to which inquiry Mr. Van Ness replied: "I meant to mention that. I am sorry I did not. There are allegations in the bill, your Honor, that there was some fraud and that there was some conspiracy, and these other allegations that I have mentioned, that the books were not kept in a proper way so that we could obtain a true statement of the financial condition of the company. With reference to the item of fraud, I want to say this, in justice to counsel and the defendants, that there was no evidence that there had been any stealing or any actual misappropriation of funds by the defendants. So, I am not making any contention in my argument before your Honor that there was, so far as could be determined, any actual wrongdoing. The only thing I contend, it was incompetency in keeping their books;" whereupon, Mr. Leviton stated: "Well, you see, your Honor, that clears this case immediately of a lot of extraneous issues." It is to be noted that Mrs. Goodman,

conspiracy to defraud the plaintiff or any other association of their rights and interests in said corporation and that the plaintiff has wholly failed to establish that any of said defendants were guilty of fraud or illegal or oppressive conduct, or that any of their acts in understanding the management of corporate affairs warranted the appointment of a receiver for the plaintiff's interest. Company or entitled the plaintiff to any of the equitable relief sought in the amended complaint.

"In Conclusion, the Master recommends the entry of a decree in accordance with the findings hereinabove set out, dismissing the amended complaint for want of equity."

Mrs. Goodman, alone, filed objections to the master's report. During the hearing before the trial court upon the exceptions to the master's report Mr. Devitt, at the opening of his argument on behalf of defendants, addressed Mr. Van Ness, one of the attorneys for the Goodman, as follows: "I really would like to have you answer one question. Do you contend that anywhere in this report there has been proof of any one fraudulent disbursement?" to which inquiry Mr. Van Ness replied: "I want to mention that I am sorry I did not, there are allegations in the bill, you honor, that there was some fraud and that there was some conspiracy, and these other allegations that I have mentioned, that the books were not kept in a proper way so that we could obtain a true statement of the financial condition of the company. With reference to the item of fraud, I want to say this, in justice to counsel and the defendants, that there was no evidence that there had been any stealing or any actual misappropriation of funds by the defendants. So, I am not making any contention in my argument before your honor that there was, so far as could be determined, any actual fraud. The only thing I contend is that incompetency in keeping their books." Whereupon, Mr. Devitt stated: "Well, you see, your honor, that clearly this is a misstatement of a lot of extraneous issues." It is to be noted that Mr. Goodman.

shortly after the aforesaid statement was made by her attorney, caused other attorneys to be substituted as her attorneys. When the suit was filed, Messrs. Wilhartz, Hirsch & Schanfarber represented her. During the trial before the master and the trial court Messrs. Hummer & Hummer represented her. She is represented in this court by a third set of attorneys. There were three audits made of the books of the Theatre Company. The first one was made by Mr. Reilly, of the United States Audit Company, an employee of the husband of Mrs. Goodman. Mr. and Mrs. Goodman recommended to the original defendants that Reilly make a check and audit of the books, and Reilly, thereafter, did make a check and audit ten to fifteen times a year. Later Mrs. Goodman employed Mr. Rubel to audit the books. Still later she employed Mr. Samels to audit the books. Plaintiff's present counsel, in this court, admit that she was unable to prove that the original defendants had been guilty of actual dishonesty. The original and amended complaints charge that the original defendants entered into a conspiracy to deprive the other stockholders of their right and interest as such stockholders and to unlawfully exploit such corporation and divert its assets for their own benefit. The complaints make repeated charges of fraud against the original defendants, and it was upon these charges that plaintiffs based their right to an accounting and to have a receiver appointed for the Theatre Company. Having utterly failed to sustain the serious charges she made in the original and amended complaints, plaintiff now seeks to evade the payment of the costs of the suit by contending that her suit inured to the benefit of the stockholders. She filed many objections to the report of the master, but her counsel have not seen fit to incorporate them in the abstract, nor is any reference made in plaintiff's brief and argument to the said objections. As defendants argue, such action on the part of plaintiff practically amounts to an abandonment of all of the objections made to the report. Mrs. Goodman now questions three items upon

shortly after the aforesaid statement was made by her attorney,
caused other attorneys to be substituted as her attorneys, whom
the suit was filed, Messrs. Williams, French & Thompson
represented her. During the trial before the master and the
trial court Messrs. Williams & French represented her, and she
represented in this court by a third set of attorneys, where
were three affidavits made of the books of the Theatre Company. The
first one was made by Mr. Kelly, of the United States
Company, an employee of the husband of Mrs. Goodman, and
Mrs. Goodman recommended to the original defendants that Kelly
make a check and audit of the books, and Kelly, thereafter, did
make a check and audit ten to fifteen times a year. Later Mrs.
Goodman employed Mr. Kelly to audit the books. Still later she
employed Mr. Kelly to audit the books. Plaintiff's present
counsel, in this court, admit that she was unable to prove that
the original defendants had been guilty of actual dishonesty. The
original and amended complaints charge that the original defendants
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right and interest as such stockholders and to unlawfully exploit
such corporation and divert its assets for their own benefit. The
complaints make repeated charges of fraud against the original
defendants, and it was upon these charges that plaintiff based
their right to an accounting and to have a receiver appointed for
the Theatre Company. Having already failed to sustain the various
charges she made in the original and amended complaints, plaintiff
now seeks to evade the payment of the costs of the suit by contending
that her suit turned to the benefit of the stockholders. She filed
many objections to the report of the master, but her counsel have
not seen fit to incorporate them in the brief, nor is any refer-
ence made in plaintiff's brief and argument to the said objections.
As defendants argue, such action on the part of plaintiff
practically amounts to an abandonment of all of the objections

the books of the Theatre Company. We find no substantial merit in this complaint. There is force in the contention of defendants that Mrs. Goodman is carrying on the instant proceeding solely to harass and annoy the Theatre Company and its officers and directors. When her counsel conceded, before the trial court, that there was no evidence to prove any actual wrongdoing by the original defendants and that the only charge plaintiff could make, under the proof, was incompetency in keeping the books, plaintiff should have voluntarily dismissed the suit, especially in view of the fact that she was a director and Vice-President of the Company and had full access to its books of account. Walter S. Auerbach, her son, was also a director in the company.

After a careful examination of the record, we find ourselves in full accord with the findings and conclusions of the master and the decree of the trial court. There is no merit in the instant appeal, and the decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

the books of the Theatre Company. It is no substantial matter in this complaint. There is force in the contention of defendant that Mrs. Goodman is carrying on the instant proceedings solely to harass and annoy the Theatre Company and its officers and directors. When her counsel contended, before the trial court, that there was no evidence to prove any actual wrongdoing by the original defendants and that the only charge plaintiff could make, under the proof, was incompetency in keeping the books, plaintiff should have voluntarily dismissed the suit, especially in view of the fact that she was a director and Vice-President of the company and had full access to its books of account. Walter S. Ansbach, her son, was also a director in the company.

After a careful examination of the record, we find ourselves in full accord with the findings and conclusions of the master and the decree of the trial court. There is no merit in the instant appeal, and the decree of the Circuit Court of Cook County is affirmed.

ROBERT WILLIAMS,

Friend, P. J., and Sullivan, J., concur.

41203

ELLA JANE DYMOND,
Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

311 I.A. 250

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action to recover damages for personal injuries sustained by plaintiff when she fell on the sidewalk just adjacent to the curb at the northeast corner of Western avenue and Madison street, Chicago. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of \$16,000. Motions of defendant for a directed verdict and for a new trial were denied and defendant appeals from a judgment entered upon the verdict.

No point is made upon the pleadings. The complaint alleges, inter alia, "that defendant, not regarding its duty in that behalf, on to-wit, September 19, 1937, and prior thereto there wrongfully and negligently suffered and permitted said street curbing to be and remain in a bad and unsafe condition and repair, allowing said curbing to become chipped, broken, crumbled and uneven; that plaintiff while stepping from the surface of West Madison street, a point to-wit about fifteen feet east of the east curb of North Western avenue onto the sidewalk along the north side of West Madison street, unavoidably and necessarily stepped on said curbing along said street and immediately adjacent to said sidewalk as afore-described and while in the exercise of due care for her own safety, then and there was caused to trip and stumble by reason of said broken and uneven condition of said curbing, the result of defendant's aforesaid negligence, and she was thereby thrown and fell to and upon the ground with great force and violence; that the defendant

ELLA JANE DYMOND
Appellee,

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OF COOK COUNTY,

CITY OF CHICAGO, a Municipal
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An action to recover damages for personal injuries

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No point is made upon the pleadings. The complaint alleges, inter alia, "that defendant, not regarding its duty in that behalf, on to-wit, September 19, 1937, and prior thereto there wrongfully and negligently suffered and permitted said street curbing to be and remain in a bad and unsafe condition and repair, allowing said curbing to become cracked, broken, crumbled and uneven; that plaintiff while stepping from the surface of West Madison Street, a point to-wit about fifteen feet east of the east curb of North Western Avenue onto the sidewalk along the north side of West Madison Street, unavoidably and necessarily stepped on said curbing along said street and immediately adjacent to said sidewalk as afore-said and while in the exercise of due care for her own safety, then and there was caused to trip and stumble by reason of said broken and uneven condition of said curbing, the result of defendant's aforesaid negligence, and she was thereby thrown and fell to and upon the ground with great force and violence; that the defendant

had notice or knowledge of, or by the exercise of proper care should have had notice and knowledge of, the existence of said chipped, broken, crumbled and uneven portion of said curbing adjacent to said sidewalk for a long time prior to the plaintiff's injury herein complained of."

The following are the errors relied upon by defendant for a reversal of the judgment: "1. The verdict and judgment are against the manifest weight of the evidence. 2. The judgment is in contravention of the law. 3. The court erred in refusing to instruct the jury to find the defendant not guilty. 4. The court erred in denying the defendant's motion for a new trial. 5. The court erred in not holding that the plaintiff was guilty of contributory negligence as a matter of law."

Plaintiff testified that she resided at 2419 West Adams street, where she had lived for forty-eight years; that she was about seventy-four and a half years old; that the accident happened about ten minutes to eleven a. m., September 19, 1937, on the northeast corner of Madison street and Western avenue, Chicago; that her home is west of Western avenue; that she started from there that morning with Mr. Rodgers, a cousin by marriage; that they walked east to Western avenue, then north on the west side of Western avenue, crossed Madison street, then walked to the east side of Western avenue; that it was a very nice day; that when they got to the northeast corner there were a number of poles along the curb so that she could not see a street car if it approached; that they stood there for a second and then she stepped off the curb a little to the southeast to look east for a street car; that she intended to go west on Madison street, on a street car, to Keeler avenue; that she did not see a car coming and after standing there a couple of seconds she turned to go back on the sidewalk and "stepped up;" that she was looking where she was going but something seemed to give under her, her foot got caught, and she went

had notice or knowledge of, or by the exercise of proper care should have had notice and knowledge of, the existence of said chipped, broken, crumbled and uneven portion of said sidewalk adjacent to said sidewalk for a long time prior to the plaintiff's injury herein complained of."

The following are the errors relied upon by defendant for a reversal of the judgment: "1. The verdict and judgment are against the manifest weight of the evidence. 2. The judgment is in contravention of the law. 3. The court erred in refusing to instruct the jury to find the defendant not guilty. 4. The court erred in denying the defendant's motion for a new trial. 5. The court erred in not holding that the plaintiff was guilty of contributory negligence as a matter of law."

Plaintiff testified that she resided at 2419 West Adams

street, where she had lived for forty-eight years; that she was about seventy-four and a half years old; that the accident happened about ten minutes to eleven a. m., September 19, 1937, on the northeast corner of Madison street and Western Avenue, Chicago; that her home is west of Western Avenue; that she started from there that morning with Mr. Rodgers, a cousin by marriage; that they walked east to Western Avenue, then north on the west side of Western Avenue, crossed Madison street, then walked to the east side of Western Avenue; that it was a very nice day; that when they got to the northeast corner there were a number of poles along the curb so that she could not see a street car if it approached; that they stood there for a second and then she stepped off the curb a little to the southeast to look east for a street car; that she intended to go west on Madison street, on a street car, to Meeker Avenue; that she did not see a car coming and after standing there a couple of seconds she turned to go back on the sidewalk and "stepped up;" that she was looking where she was going but some-thing seemed to give under her, her foot got caught, and she went

sprawling forward, flat; that Mr. Rodgers picked her up. The witness then testified at length as to her injuries, the treatment of the same, and the expenses that she incurred as a result of the injuries. The following are the salient parts of the cross-examination of the witness: She stated that she had been a public school teacher for a great many years; that she quit teaching in June, 1930; that on the morning in question she was on her way to a church located at the corner of Addison street and Keeler avenue, and that to reach it it was her custom to either take a bus westward on Jackson boulevard or a westbound street car on Madison street; that she did not make an examination of the place where she fell after she fell; that the last time she saw the place before the day of the accident must have been months prior thereto as she was away for about three months; that on that prior occasion she does not remember seeing the curb then, but remembers seeing the sidewalk; that on the day of the accident, when she got to the northeast corner she paused there for a minute, then stepped out into the street and walked in a diagonal direction to the southeast for probably three or four feet; that she stepped out into the street because she wanted to see if the car was coming; that when she turned to walk back to the curbstone she turned to her left and walked north, straight north; that while she was standing on the sidewalk before she stepped into the street she did not notice "the surroundings, the street or the sidewalk;" that she "only looked for the street car;" that she is naturally cautious and looked down as she stepped off the curb. The following then occurred: "Q. And when you walked back again to step up, you looked down as well, didn't you? A. Yes, I guess I did. * * * Q. You saw where you were placing your foot when you stepped back on the curb, didn't you? A. Yes. Q. And just what did you see there as you stepped onto the curb? A. Well, I suppose I saw a solid sidewalk or solid curb. I stepped and something gave --- * * *

as you stepped onto the curb? A. Well, I suppose I saw a solid the curb, didn't you? A. Yes, Q. And just what did you see there You saw where you were placing your foot when you stepped back on looked down as well, didn't you? A. Yes, I guess I did. * * * Q. then occurred: "Q. And when you walked back again to step up, you cautious and looked down as she stepped off the curb. The following that she "only looked for the street car;" that she is naturally did not notice "the surroundings, the street or the sidewalk;" standing on the sidewalk before she stepped into the street she to her left and walked north, straight north; that while she was that when she turned to walk back to the curbstone she turned into the street because she wanted to see if the car was coming; southeast for probably three or four feet; that she stepped out out into the street and walked in a diagonal direction to the the northeast corner she paused there for a minute, then stepped the sidewalk; that on the day of the accident, when she got to she does not remember seeing the curb then, but remembers seeing as she was away for about three months; that on that prior occasion before the day of the accident must have been months prior thereto she fell after she fell; that the last time she saw the place street; that she did not make an examination of the place where ward on Jackson Boulevard or a westbound street car on Madison and that to reach it it was her custom to either take a bus west- a church located at the corner of Addison street and Keeler avenue, June, 1930; that on the morning in question she was on her way to school teacher for a great many years; that she quit teaching in nation of the witness: and stated that she had been a public injuries. The following are the salient parts of the cross-examination of the same, and the expenses that she incurred as a result of the witness then testified at length as to her injuries, the treatment sprawling forward, that that Mr. Rogers picked her up. The

under my foot. * * * Q. So that when you stepped down to the curb, it was as far as you could see a solid curb? * * * And the portion you stepped on was flush with the rest of the curb was it not? I mean it was even with the rest of the curb? A. As far as I know, yes. Q. Now, did you see anything on that curb that looked out of the ordinary or was suspicious? That is, that portion you stepped on, as you were stepping onto it? A. Well, it looked like — like it might be whole, not whole, it might have been damaged, but I supposed it wasn't damaged, or I wouldn't have stepped on it. Q. You mean it was cracked? A. I don't know. * * * Q. Now, was there any other place on that curb that looked perfect to you? A. Any other places on the curb perfect or just perfect? Q. That weren't broken, that didn't appear damaged. A. Where I stepped off, it was perfect. * * * Q. Well, then, Miss Dymond, in other words the portion of the curb that you stepped on, as far as you could examine it when you looked at it, was apparently in a good condition, was it? A. You mean when I stepped down or when I stepped up? Q. When you stepped up. A. I supposed that it was solid, or I wouldn't have stepped on it. Q. Well, then there was nothing on the surface of this curb to indicate that there was a broken condition beneath it, was there? * * * A. I guess the answer to that is no. * * * Q. Well, let me put it this way. Miss Dymond, as far as you could notice — you looked as you stepped up, I take it. You said you were cautious when you stepped up. A. I was, yes. Q. And you looked at this particular curb as you stepped on it? A. Yes. * * * Q. When you were about to place your foot on the curb to get back onto the sidewalk, you looked at the curbstone, didn't you? A. Yes. * * * Q. Well, now, how did that curb appear to you as you placed your foot on it? * * * A. I wouldn't have stepped on it if it hadn't appeared safe. * * * But when I did step on it, something gave way and my foot went in a hole. * * * Q. Now, when you placed your foot on

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the curb, your foot didn't catch then, did it? A. Something gave and my foot slipped into a hole, when I put it on. Q. It was after you placed your foot on the curb that it slipped and you caught your foot, is that right? A. After I put my foot on the curb. * * * Q. And it was after that that your foot slipped and you caught it on something there? A. Well, something gave causing my foot to slip. Q. Yes, and it was after your foot slipped that it caught, is that right? A. Naturally, yes. Q. Now, which direction did your foot slip, do you know? Was it to the east, to the west, to the north or to the south? A. The south, I would say, because I fell forward to the north. Q. And that was your right foot? A. Yes. * * * Q. And I take it as you approached this curb and looked at it, your glance included a portion of the curb to either side, did it not? A. Yes, I suppose so." The witness further testified that at the time in question her eyesight was perfectly all right, as she had ~~had~~ her glasses on and her sight was good with her glasses on.

Henry J. Rodgers, a witness for plaintiff, testified that he lived at Jacksonville, Illinois, was in the banking business for twenty-four years and was mayor of Jacksonville for four years; that plaintiff was a cousin of his wife and he had known her for many years; that he was with her when she left home, and when the accident happened. The witness then gave similar testimony to plaintiff's as to the manner in which they reached the northeast corner of Madison street and western avenue. He further testified that when they got to the northeast corner they stopped at the edge of the pavement and waited for the street car; that as they stood on the corner facing south plaintiff was to his right; that he saw plaintiff step out into the street a few steps; that she turned to come back and fell on the sidewalk on the left side of where the witness was standing; that after the accident he noticed that the curbing was broken; that the curbing was about six inches wide and six inches high and there

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was a break in the pavement where the curb joins the walk, "a small break there;" that at the south end of the break in the curbing the break was about eight or ten inches wide; that from the curb the break extended north possibly eight to ten inches; that he did not see the break before plaintiff fell; that the outer edge of the break was possibly five inches deep; that on the west side of the break next to the witness there were broken fragments of concrete; "that it was a beautiful morning, bright sunshine, nice." At this point in the testimony plaintiff's counsel had four photographs marked plaintiff's exhibits 32, 33, 34 and 35. The witness, after inspecting plaintiff's exhibit 33, stated that it showed the conditions as they were at the northeast corner of Madison street and Western avenue at the time in question. He then testified that plaintiff's exhibits 34 and 35 correctly represented the sidewalk, the curb and the conditions as they were on the morning in question. At the request of counsel for plaintiff the witness placed an "x" on exhibit 32 and testified that the "x" marked the spot where plaintiff fell. The witness then placed an "x" on plaintiff's exhibit 33 and testified that the "x" marked the spot where plaintiff fell. Upon cross-examination the witness testified that he did not have occasion to look at the sidewalk from the time he stepped on it until plaintiff fell; that as soon as they got to the northeast corner they were looking for a street car and he did not pay any attention to the sidewalk; that at the time plaintiff fell he was standing practically right by the hole in the curbing that plaintiff fell into; that his left foot was about six inches away from where she fell; that he did not examine the sidewalk until after she fell; that when plaintiff fell he picked her up and assisted her away from the place.

Thomas Irving, a witness for plaintiff, testified that for twenty-three years he had been the janitor of the building located at the northeast corner of Madison street and western avenue; that

was a break in the pavement where the curb joined the wall, "a small break there;" that at the south end of the break in the curbing the break was about eight or ten inches wide; that from the curb the break extended north possibly eight to ten inches; that he did not see the break before plaintiff fell; that the outer edge of the break was possibly five inches deep; that on the west side of the break next to the witness there were broken fragments of concrete; "that it was a beautiful morning, bright sunshine, nice." At this point in the testimony plaintiff's counsel had four photographs marked plaintiff's exhibits 32, 33, 34 and 35. The witness, after inspecting plaintiff's exhibits 32, stated that it showed the conditions as they were at the northeast corner of Madison street and Western avenue at the time in question. He then testified that plaintiff's exhibits 34 and 35 correctly represented the sidewalk, the curb and the conditions as they were on the morning in question. At the request of counsel for plaintiff the witness placed an "x" on exhibit 32 and testified that the "x" marked the spot where plaintiff fell. The witness then placed an "x" on plaintiff's exhibit 33 and testified that the "x" marked the spot where plaintiff fell. Upon cross-examination the witness testified that he did not have occasion to look at the sidewalk from the time he stepped on it until plaintiff fell; that as soon as they got to the northeast corner they were looking for a street car and he did not pay any attention to the sidewalk; that at the time plaintiff fell he was standing practically right by the hole in the curbing that plaintiff fell into; that his left foot was about six inches away from where the fall; that he did not examine the sidewalk until after she fell; that when plaintiff fell he picked her up and assisted her away from the place.

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it was part of his duties to keep the sidewalk clean; that plaintiff's exhibits 32 and 33 correctly represent the situation at the northeast corner of Madison street and Western avenue and the condition of the sidewalk as it was on September 19, 1937; that it had been in the same condition for about three months prior to the accident.

Defendant offered no evidence.

Exhibits 32 and 33 are before us. They show that the entire curbing in front of the store on the northeast corner and portions of the sidewalk just adjacent to the curbing were in a very bad and unsafe condition. As alleged in the complaint, "the curbing had become chipped, broken, crumbled and uneven," and not only the curbing itself but parts of the sidewalk adjacent to the curb had broken away. It appears to us that the condition had been produced by the wheels of heavy trucks and vehicles striking the curb until finally the curb and also portions of the sidewalk just adjacent to the curb crumbled away. The condition is so obvious that a person standing on the opposite side of the street could have readily seen that the curb and portions of the sidewalk were destroyed. As counsel for plaintiff argued to the jury, it must have taken a long time to produce the condition that was present at the time of the accident. It is surprising, indeed, that such a condition could have existed at a busy corner like Madison street and Western avenue. Exhibits 32 and 33, were introduced by plaintiff, and her counsel, during the trial and here, insist that they correctly represent the situation at the time of the accident. Mr. Rodgers was asked by plaintiff's counsel to mark on exhibits 32 and 33 the spot where plaintiff fell, and he marked on both photographs a spot located within the defective curbing. Plaintiff was not asked to indicate on said exhibits the spot where she fell, and it is reasonable to assume that plaintiff's counsel did not question her on that subject for the reason that she persisted

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in stating that she was looking where she was going, that she was naturally cautious, and that when she stepped back on the curb there was nothing on the surface of the curb to indicate that it was in a defective condition.

In our view of this appeal it is only necessary for us to consider one contention raised by defendant, viz., that the manifest weight of the evidence shows that plaintiff was not in the exercise of due care and caution for her own safety at the time of the injury. In support of this contention defendant argues that the manifest weight of plaintiff's testimony clearly shows that at the time of the accident the curbstone and sidewalk adjacent thereto at the place of the accident were in an obviously defective condition; that "it was a beautiful morning, bright sunshine, nice," and that if plaintiff had exercised any care when she stepped from the street onto the curb she could not have failed to observe the defective condition of the curb and the sidewalk adjacent thereto. We are constrained to agree with this contention and argument of defendant. At the trial plaintiff's counsel contended that exhibits 32 and 33 correctly represent the condition that existed at the time of the accident and prior thereto. Indeed, they contend here that these exhibits show the condition of the curb and sidewalk as it was on the day of the accident and as it had been for at least three months prior to the accident. As we have stated, the defective condition was so obvious that it could have been plainly seen by a person standing on the opposite side of the street. Plaintiff testified that she was naturally cautious and that she looked at the curb when she was about to place her foot on it. The able and ingenious counsel for plaintiff argues here that the accident was not caused by the curb but it "was caused by a definite hole in the walk." (Italics ours.) This is an afterthought. The complaint charges that plaintiff stepped on the curbing and that because of the bad and unsafe condition and repair of the curbing she "was caused to trip and stumble by reason of said broken and uneven condition of said

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curbing." Plaintiff's counsel, in his statement to the jury, stated, "She turned to step on the curb and put her right foot upon the curb and into the hole that was there in the curb and extended along the crevice in the sidewalk." The plaintiff testified that she stepped on the curb and something gave way under her foot; that when she stepped on it "something gave way and my foot went in a hole."

Defendant strenuously contends that we should hold, as a matter of law, that plaintiff was guilty of contributory negligence that proximately contributed to her injuries. This contention will not be sustained.

The judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

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41233

JOSEPH KOSCHER,
(Plaintiff)

Appellee,

v.

RALPH M. GATELY, THERESA GATELY
BULGER, ROULA J. ANNES RESTAURANT
COMPANY, an Illinois corporation,
JOHN J. ANNES RESTAURANT COMPANY,
an Illinois corporation, JOHN J.
ANNES and JAMES J. ANNES,
Defendants.

APPEAL FROM
SUPERIOR COURT OF
COOK COUNTY.

RALPH M. GATELY, THERESA GATELY
BULGER and ROULA J. ANNES RESTAURANT
COMPANY, an Illinois corporation,
(Defendants) Appellants.

311 I.A. 250²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action brought to recover damages under the Dram Shops Act. Upon motion of plaintiff John J. Annes Restaurant Company, John J. Annes and James J. Annes were dismissed from the case. A jury returned a verdict finding the remaining defendants, Ralph M. Gately, Theresa Gately Bulger and Roula J. Annes Restaurant Company, a corporation, guilty and assessing plaintiff's damages at \$1,250. They filed a motion for a new trial, which was overruled and judgment in the sum of \$350 was entered upon plaintiff's entering a remittitur in the sum of \$900. Ralph M. Gately, Theresa Gately Bulger and Roula J. Annes Restaurant Company, an Illinois corporation, defendants, appeal.

The complaint alleges, in substance, that on or before August 22, 1938, defendants Ralph M. Gately and Theresa Gately Bulger were the legal holders of record of the fee simple title to the premises in question; that Roula J. Annes Restaurant Company was the owner of and operated a restaurant, tavern and saloon in said premises, known as 57 East Adams street, Chicago, wherein intoxicating liquors were sold and served to persons who patronized said restaurant, tavern and saloon; that said premises

41233

JOSEPH KOCHNER,
(Plaintiff)

Appellant

v.

RAULPH M. GATELY, THERESA GATELY,
BULGER, ROULA J. ANNES RESTAURANT
COMPANY, an Illinois corporation,
JOHN J. ANNES RESTAURANT COMPANY,
an Illinois corporation, JOHN J.
ANNES and JAMES J. ANNES,
Defendants.

APPEAL FROM

SUPERIOR COURT OF

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3111.A.250

of said Restaurant Company were leased by said Gately and Bulger to said Restaurant Company for the purpose of conducting a restaurant, tavern and saloon and said Restaurant Company was at the time in question conducting said business with the full knowledge and consent of said defendants Gately and Bulger; that plaintiff at the time and place in question was at all times in the exercise of due care and caution for his own safety; that at the time in question and prior thereto there was in full force and effect a certain statute of the State known as the Liquor Control Act and that chap. 43, Dram Shops, par. 135, Ill. Rev. Stat. 1939, provides as follows:

"135. Actions for damages caused by intoxication.] Sec. 14. Every husband, wife, child, parent, guardian, employer or other person, who shall be injured, in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving alcoholic liquors aforesaid, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suit and to control the same and the amount recovered as a feme sole; and all damages recovered by a minor under this Act shall be paid either to such minor, or to his or her parent, guardian or next friend as the court shall direct; and the unlawful sale, or giving away, of

of said Restaurant Company were leased by said Gately and Bulger to said Restaurant Company for the purpose of conducting a restaurant, tavern and saloon and said Restaurant Company was at the time in question conducting said business with the full knowledge and consent of said defendant Gately and Bulger; that plaintiff at the time and place in question was at all times in the exercise of due care and caution for his own safety; that at the time in question and prior thereto there was in full force and effect a certain statute of the State known as the Liquor Control Act and that chap. 43, Drum Shops, par. 135, Ill. Rev. Stat. 1939, provides as follows:

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alcoholic liquor, shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this Act may be by any appropriate action in any of the courts of this State having competent jurisdiction."

The complaint then alleges that at the time in question said Restaurant Company sold to an unknown man who was then and there a patron of said premises certain intoxicating liquors and alcoholic liquors and that he then and there became and was intoxicated and under the influence of intoxicating liquors so sold by said defendant; that because of the intoxicated condition of said unknown man so caused in whole or in part by reason of defendant's having then and there sold, given or furnished intoxicating liquors to him plaintiff was assaulted, stabbed and seriously injured. The complaint sets up in detail the alleged physical injuries sustained and certain other losses sustained by reason of said injuries "to the damage of the plaintiff in the sum of \$20,000."

Defendants, in their answer, admit the ownership of the property in which the tavern and restaurant was being operated; admit that said Restaurant Company operated said tavern and restaurant and therein sold and gave alcoholic liquors; admit that the sale of alcoholic liquors in said tavern was with the knowledge and consent of the defendants who were the owners of the property. The answer denies that any man, known or unknown, at the time and place in question became intoxicated; denies that plaintiff was injured as the result of the intoxication of any man, known or unknown. The answer avers that if plaintiff was injured by any unknown man at the time and place in question it was because of plaintiff's failure to exercise due care and caution for his own safety, and was not due to any acts or conduct on the part of

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alcoholic liquors and that he then and there became and was intoxi-
cated and under the influence of intoxicating liquors so sold by
said defendant; that because of the intoxicated condition of said
unknown man so caused in whole or in part by reason of defend-
ant's having then and there sold, given or furnished intoxicating
liquors to him plaintiff was assaulted, stabbed and seriously
injured. The complaint sets up in detail the alleged physical
injuries sustained and certain other losses sustained by reason
of said injuries "to the damage of the plaintiff in the sum of
\$20,000."

Defendants, in their answer, admit the ownership of the
property in which the tavern and restaurant was being operated;
admit that said Restaurant Company operated said tavern and
restaurant and therein sold and gave alcoholic liquors; admit
that the sale of alcoholic liquors in said tavern was with the
knowledge and consent of the defendants who were the owners of the
property. The answer denies that any man, known or unknown, at the
time and place in question became intoxicated; denies that plaintiff
was injured as the result of the intoxication of any man, known or
unknown. The answer avers that if plaintiff was injured by any
unknown man at the time and place in question it was because of
plaintiff's failure to exercise due care and action for his own

defendants for which they could be held legally responsible under the statute relied upon by plaintiff.

Plaintiff's theory of fact was that on August 22, 1938, the Restaurant Company, through its bartender or bartenders, sold alcoholic liquor to an unknown man; that thereafter said man became intoxicated and said Restaurant Company continued to serve him alcoholic liquors while he was in a state of intoxication; that as the result of the intoxication of said man and while plaintiff was in the exercise of due care and caution for his own safety, said unknown man, without any provocation or justification for his said act, assaulted and stabbed plaintiff.

Defendant states that its theory of fact is as follows: "Defendants contend that the unknown man in question was not intoxicated; that the intoxication, if any, was not the effective cause of the assault and that the plaintiff by reason of his own misconduct brought about the supposed assault; that therefore, the plaintiff was not entitled to any damages whatsoever and was under no circumstances entitled to exemplary damages."

After a careful examination of the evidence we are satisfied that the jury were justified in finding for plaintiff. That plaintiff, while a patron in the saloon, was stabbed by another patron of the place, described by the bartender and other employees of the Restaurant Company as "the little Italian fellow," is undisputed. The jury were warranted in finding that the Restaurant Company sold alcoholic liquors to the unknown man, that thereafter said man became intoxicated and said Restaurant Company continued to serve alcoholic liquors while he was in a state of intoxication, and that the attack on plaintiff was without provocation and was due to the intoxicated condition of the unknown man, who fled after the stabbing. The doctor who attended plaintiff testified that he "found a wound with a dressing on it on the left side, just at the edge of the ribs, of the abdomen, and this was a ~~abscess~~ clean

defendants for which they could be held legally responsible under the statute relied upon by plaintiff.

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cut, clean edges about one and a half inches long and closed with sutures, - stitches, in other words;" that he "changed the dressing and examined the wound;" that he saw plaintiff about eight or ten times; that "first I changed the dressings about every two to three days, and in about the usual time, - eight or nine days, - I removed the sutures and after that he came back and there was a redness and swelling in the wound and I found some pus, and I allowed that to drain and observed it and watched it and he came in several times for the dressing and drainage;" that he charged plaintiff \$20 for his services.

After a consideration of the record we are unable to understand why defendants should complain of the judgment entered. It seems to us that they should feel grateful that plaintiff was not killed, or more seriously injured than he was. The stabbing occurred at 2:30 o'clock in the morning. The bartender testified that there were between thirty and fifty patrons in the place at the time, some men, some women. There were women waitresses and several women operating games of chance. After the stabbing plaintiff went to St. Luke's hospital, where an interne put six stitches in the wound and a bandage over the entire side. Plaintiff was not able to go to work for about seventeen days. He then went to work for about six weeks on a new job. At the end of that time he was obliged to quit the job because the weight of the accordin he played, on the wound, "made it very uncomfortable," and in order to give his side a chance to heal he worked two nights a week at banquets, dances and one-night affairs, averaging \$15 a week in earnings. He went back to work permanently on December 12, 1938. At the time he was stabbed he was receiving as pay \$6 a night. Plaintiff further testified that the stabbing caused a big rip in his coat as well as his pants, and that both garments were bloody; that St. Luke's hospital charged him \$5 for the first aid treatment and he paid \$2 on account of the same.

We have considered the four errors assigned in support of

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the contention that a new trial should be awarded, but find that none has substantial merit. If the case were tried again and before an intelligent jury, defendants could not reasonably expect to obtain a verdict for as small an amount as the trial court allowed plaintiff in the instant judgment.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

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The judgment of the Superior Court of Cook County is

affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

41265

SOL D. GOLBY,
Appellee,

v.

SECURITY MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK, a corpor-
ation,

Appellant.

42 a
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

311A 251

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Sol D. Golby, a private detective, operating under the name and style of Co-Operative Service Company, brought an action against defendant for \$191.95 for a balance alleged to be due him for detective services rendered defendant. The cause was submitted to the court without a jury and after evidence heard the court found the issues against defendant and assessed plaintiff's damages at the sum of \$191.95. Defendant appeals from a judgment entered upon the findings.

Plaintiff's theory is that defendant, acting through one Metzger, its Chicago agent, employed the plaintiff to make an investigation to determine whether fraud had been practiced upon defendant in the procuring of certain policies upon which claims by the beneficiaries of the policies were then pending. Defendant's theory is that any investigation made by plaintiff was not made at its direction nor request, nor upon the direction nor request of Metzger, its Chicago agent; that plaintiff made an investigation at the request and upon the hiring of a third party, Simon Herr, in nowise connected with defendant; that there was no contract of employment, express or implied, between plaintiff and defendant. In support of its contention that the judgment of the Municipal court should be reversed, defendant contends that plaintiff had no standing in a court of law for the services alleged in his complaint, because he had not complied with a then existing State statute and a City ordinance requiring private detectives to be licensed, and that "where a State Statute or City Ordinance requires the licensing

SOL D. GOLBY, Appellee,

v.

SECURITY LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Plaintiff.

CITY OF CHICAGO, Defendant.

3111A-251

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of a business, the obtaining of a license is a prerequisite to the maintaining of an action for services rendered in connection with said business." While this contention is not without force, we prefer to decide this case upon the merits. Defendant next contends that the finding of the trial court that there was a contract of employment between plaintiff and defendant is contrary to the manifest weight of the evidence. This contention is clearly a meritorious one. The overwhelming weight of the evidence shows that plaintiff was engaged to make an investigation by Simon Herr, a well-known attorney, practicing at the Chicago bar for many years, and that it was distinctly understood between Herr and plaintiff that the latter was to look to Herr for compensation in the matter and was not to look for compensation to any other person. Mr. Herr's testimony as to the aforesaid agreement was corroborated by the testimony of Maurice Ruttenberg, George Erickson and Metzger. It is difficult for us to understand how the trial court, under the evidence, could find that defendant employed plaintiff, through its agent, Metzger.

It would be highly inequitable to permit the instant judgment to stand and it is therefore reversed.

JUDGMENT REVERSED.

Friend, P. J., and Scanlan, J., concur.

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testimony of Maurice Rittenberg, George Rickson and Metzger. It

is difficult for us to understand how the trial court, under the

evidence, could find that defendant employed plaintiff, through

its agent, Metzger.

It would be highly inadvisable to permit the instant judg-

ment to stand and it is therefore reversed.

JUDGMENT REVERSED.

Friend, P. J., and Scanlan, J., concur.

41123

STANLEY MRUK,)
Appellee,)

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MRS. MRUK and MARIE MRUK,
Appellants.)

111 L.A. 251

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by defendants, Mike Mruk and Marie Mruk, his wife, seeks to reverse a decree entered in favor of plaintiff, Stanley Mruk, in accordance with the report and recommendation of the master in chancery to whom the cause had been referred.

Plaintiff's complaint filed August 20, 1938, alleged substantially that on and for a long time prior to September 7, 1935, he was the owner of the property at 2436 South 50th avenue, Cicero, Illinois; that said property was improved with a two-story building, free and clear of incumbrances, except current taxes, and that it was worth about \$10,000; that for sometime prior to September 7, 1935, he lived with defendants, his son Mike Mruk, and Marie Mruk, his daughter-in-law, who occupied the flat on the second floor of said building; that for the purpose of inducing him to convey his property to them, defendants on or about September 5, 1935, "did fraudulently, wrongfully and deceitfully state and represent to the plaintiff that if he would convey the said property to them, that they would be very kind to him as long as he should live and said defendants stated that in consideration of their love and affection for plaintiff and in consideration of the conveyance to them of said property that they would furnish him with a good home and all the necessities of life as long as he should live;" that prior to the time these statements were made "defendants had treated the plaintiff with great apparent kindness and consideration and pretended to be very solicitous as to plaintiff's welfare and plaintiff says that he was thus and thereby

...YESTERDAY

TO THE
THE

THE UNIVERSITY OF CHICAGO

This appeal by defendant, filed 1/24/68, was denied.

His wife, seeks to reverse a decision entered in favor of John-

11. [REDACTED] in accordance with the report and [REDACTED]

baton of the master in ceremony to show the cause had been

10-11-1941

Plaintiff's Complaint, filed August 20, 1998, Alleged

substantially flat on and for a long time prior to October 5,

1935. He was the owner of the property at 450 South 5th Avenue,

Cicero, Illinois; that said property was conveyed with a life-estate

building, free and clear of encumbrances, except our first mortgage.

and that it was north about 11,000; this for sometime prior to

September 7, 1955, he lived with a female, his son also took

and the fact that the defendant is a member of the same family as the person who was the victim of the crime.

second floor of a building that for the purpose of financing

him to convey his property to them, before he or he should be

2. 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636,

and request to the District that it be conveyed to said

property to them, that they would in any way be

He should live and his descendants, so that in consideration

of their love and affection for Imitat and in consideration of

The conveyance to each of said property was made in 1911.

with a good home and all the necessaries of life as long as he

should have involved the world and not just "the VII Division

"Defendants had treated the plaintiff with respect and kindness."

and considered to be very old at 100 years; has better resistance to

misled and deceived and that he believed defendants intended to carry out said promises and agreements;" that "re relied upon said statements, promises and agreement;" that "he had no means of knowing that said promises, statements and agreement were fraudulent and deceitful and were made for the purpose of cheating and defrauding him;" that "in full reliance thereon, on to-wit: September 7, 1935, by his warranty deed of that date, he conveyed said property to the defendants, Mike Mruk and Marie Mruk, as joint tenants;" that "none of the statements, promises or representations made by defendants were reduced to writing and that the said deed to the defendants contained no notice of any of said parol promises, statements or representations and that all said promises, statements and representations were by parol;" that he "received no consideration for said deed and that the defendants at all times wrongfully, fraudulently and deceitfully intended to cheat and defraud the plaintiff of his property and intended to obtain said property without paying any consideration therefor;" that "after the conveyance of said property by the plaintiff to the defendants," they "ceased to show any kindness or consideration toward plaintiff and neglected and refused to properly provide for the plaintiff as they had agreed to do;" that "on June 27, 1936, for the purpose of carrying out their plan and intention to cheat and defraud plaintiff, the property was transferred or exchanged for the premises at 2126 Wenonah avenue, Berwyn, Illinois;" that "thereafter the said Berwyn, Illinois, property was exchanged for property located at 562 Byrd road, Riverside, Illinois;" that on February 28, 1938, the last mentioned property was traded for property located at 3744 Clinton avenue, Berwyn, Illinois, where the defendants now reside; and that said property is subject to a mortgage of \$3,300, payable in monthly installments of \$30.53.

The complaint alleged further that after defendants received title to the first piece of property, they commenced a course of

obtained and delivered and that the delivery of the same is intended to
carry out said promises and agreements; that the value of the
statements, promises and agreements; that the value of the
statements, promises and agreements was intended to be
described and was not for the purpose of obtaining and delivering
them; that in full reliance thereon, on or about September 7, 1930,
by his warranty deed of last date, he conveyed said property to the
defendants, Mrs. John and Nellie Smith, as joint tenants; that none
of the statements, promises or representations made by the defendants
were reduced to writing and that the said deed to the defendants
contained no notice of any of said promises, statements or
representations and that all said promises, statements and
representations were by parol; that he "believed no consideration
for said deed and that the defendants at all times voluntarily,
freely and lawfully intended to accept and retain the
benefit of his property and intended to divide said property
without paying any consideration therefor; that after the con-
veyance of said property by the plaintiff to the defendants, they
"acted to show any kindness or good-will toward plaintiff and
neglected and refused to properly provide for the plaintiff as they
had agreed to do; that on June 17, 1930, for the purpose of carry-
ing out their plan and intention to cheat and defraud plaintiff,
the property was transferred or conveyed to the plaintiff at 212
Monmouth Avenue, Jersey, Illinois; that thereafter the said property,
Illinois, property was conveyed for property located at 202 1/2
road, Riverdale, Illinois; that on February 15, 1930, the last
mentioned property was conveyed for property located at 214 Clinton
Avenue, Jersey, Illinois, where the defendants now reside; and that
said property is subject to a mortgage of \$7,500, payable in monthly
installments of \$104.73.

The complaint alleges further that their defendants received
title to the first piece of property. They purchased a house of

cruel, unkind and inhuman treatment toward plaintiff, refusing to furnish him proper food and neglected to show any consideration for his comfort and welfare; that in July, 1938, defendants cruelly assaulted plaintiff, threw him out of their home and swore out a warrant which brought about his arrest; that the "unkind, inhuman treatment which he received became so unbearable that he left the home of defendants;" that he no longer resides with them, receives no support from them and is fearful of the harm they may do him; and that the defendants, unless restrained by an order of court, will sell or transfer the property or place further incumbrances upon same.

The complaint concluded with the following prayer: "That the Court find that upon the conveyance of the said property to the defendants that they became trustees therefor, under a constructive trust, and that the said trust property be followed by the court to the property which is now owned by the defendants, and that the Court find that said property located at 3744 Clinton Avenue, Berwyn, Illinois, is now owned and held by the said defendants as a constructive trust for the use and benefit of the plaintiff.

"That an accounting may be had between the plaintiff and the defendants as to the value of the said property conveyed to them by plaintiff and as to the value of the said property which the defendants now own through various trades and transactions, and that if it be found that the said property now owned by the defendants, as trustees under a constructive trust for the benefit of the plaintiff, be of less value than the property originally conveyed to them by the plaintiff, that this plaintiff may have judgment against the defendants, and each of them, for the difference in the valuation of the said properties.

"That the Court enjoin the defendants, and each of them, from selling or conveying said property now owned by them, or from encumbering it in any manner until the further order of the Court."

Defendants' answer, after admitting the various allegations of the complaint with reference to the transferring and trading of the various pieces of property, denied that the first piece of property, which was conveyed to them by plaintiff, was worth \$10,000. It further denied that they had fraudulently, wrongfully and deceitfully misled and deceived plaintiff and that they had intended to cheat and defraud him; that plaintiff relied upon false promises made by them when he conveyed the property; that the subsequent transfers of the property were made for the purpose of carrying out any plan of theirs to cheat and defraud plaintiff; and that plaintiff was compelled to leave the home of defendants.

The answer then averred that plaintiff had lived with defendants for a long time and was always welcome to live with them, provided he did not become drunk and abusive; that defendants were always kind and considerate to him; that before plaintiff conveyed the property to defendants, he consulted an attorney, who prepared the papers; and that the title to said property was transferred to defendants upon the payment of a lawful consideration and that all subsequent transfers of the property were made with the knowledge and consent of plaintiff. The answer asked that the complaint be dismissed because it failed to set forth a meritorious cause of action.

In his report the master found inter alia that in July, 1935, plaintiff was evicted with his belongings by his daughter, Mrs. Bulvas, and her husband, from the first floor apartment of the premises at 2436 South 50th avenue, Cicero, Illinois; that defendants lived in a flat on the second floor of said premises, for which they had been paying plaintiff \$30 a month rent; that three days after plaintiff was so evicted, he moved into a room in defendants' flat upon the invitation of his son Mike; that the parties agreed that if plaintiff would convey this property, which he owned, to defendants, they would maintain and support him for the rest of his life and would pay for his burial; that on September

Defendants, however, after making the various allegations of the complaint with reference to the transferring and leasing of the various pieces of property, asked that the first piece of property, which was conveyed to them by Plaintiff, was sold to them. It further denied that they had fraudulently, wrongfully and unlawfully taken and received Plaintiff and that they had intended to cheat and defraud him; that Plaintiff relied upon their promises made by them when he conveyed the property; that the defendants' promises of the property were made for the purpose of carrying out any plan of theirs to cheat and defraud Plaintiff; and that Plaintiff was compelled to leave the home of defendants.

The answer then averred that Plaintiff had lived with defendants for a long time and was always willing to live with them, provided he did not become drunk and abusive; that defendants were always kind and considerate to him; that before Plaintiff conveyed the property to defendants, he consulted an attorney, who prepared the papers; and that the title to this property was transferred to defendants upon the payment of a legal commission and that all subsequent transfers of the property were made with the knowledge and consent of Plaintiff. The answer asked that the complaint be dismissed because it failed to set forth a meritorious cause of action.

In his report the master found that Plaintiff was in July, 1935, Plaintiff was evicted from his belongings by his daughter, Mrs. White, and her husband, from the first floor apartment of the premises at 2435 South 29th Avenue, Chicago, Illinois; that defendants lived in a flat on the second floor of said premises for which they had been paying Plaintiff \$10 a month rent; that some days after Plaintiff was so evicted, he moved into a room in defendants' flat upon the invitation of his son Elmer; that the parties agreed that if Plaintiff would convey this property, which he owned, to defendants, they would maintain and support him for

7, 1935, upon the advice of his attorney, plaintiff conveyed the property by warranty deed to defendants; that this property was later traded by defendants for property in Berwyn, which in turn was traded for a bungalow in Riverside and that property was later traded for the property at 3744 Clinton avenue, Berwyn, Illinois, where the defendants now reside; that the last mentioned property is now owned by defendants, Mike Mruk and Marie Mruk, jointly and is subject to a mortgage; that plaintiff had knowledge of all the transfers and exchanges of property; and that defendants paid no rent since plaintiff went to live with them but that they paid all taxes and other incidental expenses (including \$180 which they owed plaintiff for back rent).

The master after finding that the equities were with plaintiff, recommended that a decree be entered in accordance with the findings of his report, that the decree should enjoin the defendants from transferring or conveying the real estate now owned by them until the further order of the court, that the case be rereferred to the master for the purpose of making an accounting between the parties, that a judgment be entered in favor of plaintiff and against defendants for the amount due plaintiff, and that such judgment be declared a lien against the property now owned by defendants.

The decree overruled defendants' exceptions to the master's report and approved same. After finding "that the plaintiff is in declining years and that the defendants were guilty of fraudulent intent in the first instance at the time plaintiff conveyed his property to them, and that fraud and malice are the gist of the action," the decree ordered that plaintiff have a lien on the property at 3744 South Clinton avenue, Berwyn, Illinois, now owned by defendants, "for such amount as may be found due and owing him from said defendants;" and that "an accounting be had before said master in chancery."

Defendants' theory as stated in their brief is that "there

7, 1915, upon the advice of his attorney, plaintiff conveyed the property by warranty deed to defendant, and this deed was later filed by defendant for recording in Book 1, which in turn was filed for a lien in the office of the County Clerk of the County of Cook, Illinois, and the property at 744 Illinois Avenue, Chicago, Illinois, was the defendant's and remains the defendant's property as now owned by defendant, and that the defendant is not subject to a mortgage; that plaintiff had knowledge of all the transfers and assignments of property; and that defendant paid no rent since plaintiff went to live with them but that they paid all taxes and other incidental expenses (including all which they owed plaintiff for back taxes).

The master after finding that the parties were with plaintiff, recommended that a decree be entered in accordance with the findings of the report, that the master recommended that the defendant from the time of conveying the real estate now owned by them until the further order of the court, that the case be referred to the master for the purpose of making an accounting between the parties, that a judgment be entered in favor of plaintiff and against defendant for the amount due plaintiff, and that such judgment be declared a lien against the property now owned by defendant.

The court overruled defendant's exceptions to the master's report and approved same. After finding that the plaintiff is in default of the report and that the defendant was guilty of fraudulent intent in the first instance of the time plaintiff conveyed the property to him, and that from and after the date of the action, the court ordered that plaintiff have a lien on the property at 744 Illinois Avenue, Chicago, Illinois, now owned by defendant, for such amount as may be found due and owing him from said defendant, and that the accounting be had before said master in conformity.

was no proof of actual fraud, no proof of a confidential or fiduciary relationship, no proof of facts constituting a constructive trust and no fraud or malice in the case; that the conveyance was absolute and voluntary, that the defendants were always willing and are still willing to support the plaintiff but that the plaintiff voluntarily absented himself from their home without justifiable cause and that they are under no obligation to support the plaintiff elsewhere."

Plaintiff's theory is that "because of the age and infirmity of the plaintiff, and because of other circumstances in connection with the relationship of the plaintiff and defendants, a fiduciary relationship existed between the parties. That because of the fiduciary relationship, the conveyance of plaintiff's property to the defendants, was made under such circumstances that the defendants ought not in equity and good conscience be permitted to hold it, and a court of equity will raise a trust by construction. That under the circumstances, the burden of proof was upon the defendants to show that the transaction was fair, equitable and just. That the evidence shows that the deed of plaintiff's property to defendant was obtained by fraud, and the subsequent breach of contract of the defendants and their treatment of the plaintiff was sufficient to raise a presumption of fraud in the first instance at the time the property was conveyed. That the decree of the court is fully supported by the evidence and by the pleadings."

The facts as presented in evidence before the master are practically undisputed, except as they concerned an altercation between plaintiff and one or both of the defendants in July, 1938. Plaintiff, Stanley Mruk, who was sixty-five years old in 1935 and is now about seventy years old, is the father of two sons, the defendant Mike Mruk and Walter Mruk, and one daughter, Mrs. Bulvas. For many years prior to July, 1935, Stanley Mruk owned free and clear of incumbrance, except taxes, a two-story brick building

and no proof of actual fraud, no proof of a confidential or fiduciary relationship, no proof of facts constituting a constructive trust and no fraud or undue influence in the case; that the conveyance was absolute and voluntary, that the defendants were always willing and are still willing to support the plaintiff but that the plaintiff voluntarily parted with it from their own without justifiable cause and that they are under no obligation to support the plaintiff's claim.

Plaintiff's theory is that because of the age and infirmity of the plaintiff, and because of other circumstances in connection with the relationship of the plaintiff and defendants, a fiduciary relationship existed between the parties. That because of the fiduciary relationship, the conveyance of plaintiff's property to the defendants, was made under such circumstances that the defendants ought not in equity and good conscience be permitted to hold it, and a court of equity will raise a trust by construction. That under the circumstances, the burden of proof was upon the defendants to show that the transaction was fair, equitable and just. That the evidence shows that the deed of plaintiff's property to defendant was obtained by fraud, and the subsequent breach of contract of the defendants and their treatment of the plaintiff was sufficient to raise a presumption of fraud in the first instance at the time the property was conveyed. That the action of the court is fully supported by the evidence and by the findings.

The facts as presented in evidence before the master are practically uncontroverted, except as they concerned an altercation between plaintiff and one of both of the defendants in July, 1933. Plaintiff, Stanley Frank, who was thirty-five years old in 1933 and is now about seventy years old, is the father of two sons, the defendant Alex Frank and Walter Frank, and one daughter, Mrs. Oliver. For many years prior to July, 1933, Stanley Frank owned two and one-half acres of land, a two-story brick building

at 2436 South 50th avenue, Cicero, Illinois, and resided with his married daughter, Mrs. Bulvas, on the first floor of said building, while defendants, Mike Mruk and Marie Mruk, and their two minor children resided on the second floor. The daughter, Mrs. Bulvas, and her husband paid no rent to plaintiff but gave him his board and room in exchange therefor, while defendants paid plaintiff a monthly rental of \$30. In July, 1935, prior to the original conveyance in question, Mrs. Bulvas and her husband threw plaintiff's personal belongings out on the back porch and ejected him from their apartment. Plaintiff moved his belongings into the basement of the premises and three days later, upon the invitation of Mike Mruk moved into the second floor flat with defendants. At that time defendants owed plaintiff \$180 back rent, which they later paid him in full. Early in September, 1935, after plaintiff had been living with defendants for several weeks, he and his son, Mike Mruk, called at the office of Joseph E. Klenha, an attorney. At that time plaintiff gave attorney Klenha all his personal papers and stated that he desired to convey the title to the property at 2436 South 50th avenue, Cicero, Illinois, to his son and daughter-in-law, Mike Mruk and Marie Mruk. The conveyance was made and the deed recorded. It was then understood and agreed that defendants were "to feed, board, clothe and maintain plaintiff during the remainder of his lifetime and provide him with a decent burial when he died." Thereafter plaintiff lived with defendants for three years, until July, 1938, without complaint as to his treatment. On July 27, 1936, defendants, with the consent and knowledge of plaintiff, exchanged the property formerly owned by the latter for property located at 2126 Wenonah avenue, Berwyn, Illinois. Plaintiff joined with defendants in conveying title to the new owners. In February, 1937, defendants exchanged the Wenonah avenue property for property located at 562 Byrd road, Riverside, Illinois, subject to a \$5,000 mortgage. Thereafter, in February, 1938, defendants sold the Riverside property, receiving \$3,100 cash for their equity in same and immediately pur-

at 1035 North 2nd Avenue, Chicago, Illinois, and returned with his
attorney, Mr. [redacted], on the first floor of said building,
with defendant, the first and second floors, and with his minor
children residing on the second floor. The defendant, Mrs. [redacted],
and her husband paid no rent to plaintiff and gave him no bond and
from an earlier tenancy, while defendant paid plaintiff a monthly
rent of \$10. In July, 1936, prior to the original summons in
question, Mrs. [redacted] and her husband were plaintiff's personal
defendants and on the same month and agreed with him that plaintiff
rent. Plaintiff moved his belongings into the basement of the
premises and three days later, upon the expiration of his term
moved into the second floor with his belongings. At that time
defendant paid plaintiff \$100 cash rent, which they later paid
him in full. Early in September, 1936, after plaintiff had been
living with defendant for several weeks, he and his son, [redacted],
of the office of [redacted], Chicago, an attorney, at that time
plaintiff gave attorney [redacted] all the personal papers and stated
that he desired to convey the title to the property at 1035 North
2nd Avenue, Chicago, Illinois, to his son and daughter-in-law, [redacted],
[redacted] and [redacted]. The conveyance was made and the deed recorded.
It was then understood and agreed that defendant was to live
there, alone and maintain plaintiff's living on the second floor of his
flat and provide him with a second trial when he died. There-
after plaintiff lived with defendant for some years, until July,
1936, when defendant as to his treatment. On July 27, 1936,
defendant, with the consent and knowledge of plaintiff, exchanged
the property formerly owned by the father for property located at
[redacted] and [redacted] Avenue, Chicago, Illinois. Plaintiff joined with defend-
ant in conveying title to the new property. In February, 1937,
defendant exchanged the second Avenue property for property located
at 214 1/2 West [redacted], Chicago, subject to a \$4,000 mortgage.
Thereafter, in February, 1936, defendant sold the second Avenue property.

chased the property where they now reside in Berwyn, Illinois, subject to a \$4,000 mortgage, using the money received from the sale of the Riverside property as a down payment. Plaintiff had knowledge of and apparently acquiesced in all the foregoing real estate transactions by defendants. At least he moved with them from one building to the other and continued to live with them without protest of any kind concerning said successive transactions. Defendants paid all taxes, special assessments, interest, cost of repairs and incidental expenses on all the properties since September 7, 1935, including back taxes that plaintiff owed at the time of the original conveyance. During all the time plaintiff lived with defendants he had a room for himself and received his meals, clothing and washing without any expense to himself.

For a clearer understanding of what occurred on the occasion of the altercation between the parties on July 23, 1938, it is necessary to set forth their testimony somewhat fully. The only other persons who witnessed this altercation were defendants' minor children and they did not testify.

Plaintiff, Stanley Mruk, testified as follows: "Q. What time did you come home that evening? A. I would say about nine o'clock in the evening. Q. Tell us what you did when you came home? A. On that evening that I was coming home I seen the family sitting in front of a different house, and I passed by and went into my property and sat down on the stairs for a while and then I saw them come in. They came in from the next neighbor, opened the door, got into the house and locked the door. Q. Go on and tell what happened what you did and what they did? A. When I saw that they turned the key in the door so I got up right away and said 'Here I belong to this house, this is my property' and he made a motion and struck me with his hand. Q. Go on and tell what else happened? A. He called me a God-damn robber and I said 'I am not a robber because you stole my bonds and you stole my property.' Q. What else happened? A. And he shoved me out and I grabbed myself alongside

closed the property and they now reside in New York, Illinois, subject to a \$4,000 mortgage, making the money received from the sale of the division property as a down payment. Plaintiff has knowledge of and apparently acquiesced in all the foregoing real estate transactions by defendants. It must be noted that from one billiard to the other and continued to live with them without protest of any kind concerning said extensive transactions. Defendants paid all taxes, interest, insurance, cost of repairs and incidental expenses on all the properties since September 7, 1935, including back taxes that Plaintiff owed at the time of the original conveyance, and all the time Plaintiff lived with defendants he had a room for himself and received his meals, clothing and washing without any expense to himself.

For a clearer understanding of what occurred on the occasion of the litigation between the parties on July 21, 1938, it is necessary to set forth their previously summarized facts. The only other persons who witnessed this litigation were defendants' minor children and they did not testify.

Plaintiff, hereby swears, testified as follows: "I, that

time did you come home that evening? A. I would say about nine o'clock in the evening. Q. Tell me what you did when you came home? A. On that evening that I was coming home I found the family sitting in front of a different house, and I passed by and went into my property and sat down on the stairs for a while and then I saw them come in. They came in from the next building, opened the door, got into the house and locked the door. Q. So on and tell what happened what you did and what they did? A. When I saw that they turned the key in the door so I got up right away and said 'come I belong to this house, this is my property' and he made a motion and stretch me with his hand. Q. So on and tell what else happened? A. He called me a God-damn robber and I said 'I am not a robber because you stole my house and you stole my property'. Q. What else

the bannister or whatever there was so he wouldn't throw me downstairs, so I would not fall downstairs. Q. Anything else, did anybody hit you? A. Mike struck me first in the kitchen and when they were shoving me out his boys struck me with some instrument. I don't know whether it was a knife or fork or some instrument. Q. Were you hurt? A. His wife also struck me with a chair and I pushed the chair to the side and then Mike struck me, put his finger in my mouth and I bit his finger a little bit. Q. Where did you go then? A. Then after when I bit his finger a little bit he hollered to some gentleman over there. I think he said, 'Joe come on and help' and then after they go altogether and go in an automobile and went away. Q. Were you arrested shortly afterward? A. My head was all bleeding and cut and I went over to my daughter in Berwyn, and they were there looking for me. Q. Did the police arrest you shortly thereafter? A. The police didn't take me. There was a lady that called up the police and they came over and took me. Q. When you were arrested did you spend the night in jail? Did you stay in jail one night? A. Yes, in jail I was one night. Q. When the case came up for trial before the judge who was there? A. Walter, his wife and Jalinek. From their side only Mike's wife. Q. After the trial where did you go to live? A. I went back to Mike Mruk to live. Q. How long did you stay there? A. One week. Q. How did they treat you? A. They didn't treat me very good there. They only gave me very little to eat, just enough to keep on. *** Q. Did they talk to you any after you went back to live there. A. No one. Neither Mike or his wife or the boys talked to me during that time. Q. When they sat down to eat did they call you? A. When I came from work I had to watch them because they never called me to eat, and then after they got through I went to eat. Q. Were you hungry at times? A. In the morning I fix myself and noon time she sometimes fixed a little and also in the evening. Q. After they had finished their dinner what would Mike and his wife do. A. After supper they all

[illegible]

went out for a ride. Then they would come back in two or three hours and they would bring cakes and all kinds of things to eat, but they never called me to have something. *** Q. Where did you go to live after you left Mike's house. A. I went to the second son, Walter Mruk. Q. Have you lived there ever since? A. Yes, I am living there now."

Defendant Michael Mruk testified as follows: "Q. Do you remember the time there was an argument with your father? A. Yes. Q. Tell the court just what took place on that day the argument was on, what was the cause of it, your version of it? A. I happened to come home with the family at night and he was sitting on the back porch and I started to talk to him and we all walked in the house and he comes in the house and just like a wild man after the whole bunch of us and called my wife names and me. Q. Was he talking in the English language or Polish. A. In Polish. Q. What kind of names did he call your wife? A. Well, he called her a dirty - should I say it the way he said it? Q. Well, say it, they were names that reflected upon your wife, is that right? A. Yes. Q. What else? A. Well, then, afterwards I started holding him back, he wanted to swing at me and I started holding ^{him} back and I tried not to go ahead and hurt him because I didn't want to hurt him, he is an old man ---. Q. In your opinion was your father drunk or sober at the time? A. He was drunk. Q. After this assault what happened? A. Well, I got hold of him and pushed him out on the back porch and I thought he would stay out on the back porch and get sobered up and everything would be forgotten, and he comes in again and starts cursing and I got him on the back porch again and when I did get him on the back porch he somehow or other - I didn't want to hit him - somehow or other he got hold of my finger in his mouth and he was going to bite my finger off. Q. Did he bite your fingers? A. Yes, he did so I even was told at the police station to go ahead and go to the hospital and get that finger fixed up.

went out for a ride. Then they would come back in one of those hours and they would bring coffee and all kinds of things to eat, but they never called me to have something. *** There is you go to live after you left Mike's house. I want to the second son, Walter Frank. Have you lived there ever since?

A. Yes, I am living there now."

Defendant Michael Frank testified as follows: "Q. Do you

remember the time there was an argument with your father? A. Yes. Q. Tell the court just what took place on that day the argument was on, what was the cause of it, your version of it? A. I happened to come home with the family at night and he was sitting on the back porch and I started to talk to him and we all walked in the house and he comes in the house and just like a wild man after the whole bunch of us and called my wife names and me, Q. Was he talking in the English language or Polish. A. In Polish. Q. What kind of names did he call your wife? A. Well, he called her a dirty - should I say it the way he said it? Q. Well, say it, they were names that reflected upon your wife, is that right? A. Yes. Q. What else? A. Well, then, afterwards I started holding him back, he wanted to swing at me and I started holding back and I tried not to go ahead and hurt him because I didn't want to hurt him, he is an old man - Q. In your opinion was your father drunk on sober at the time? A. He was drunk. Q. After this assault what happened? A. Well, I got hold of him and pushed him out on the back porch and I thought he could stay out on the back porch and get sobered up and everything would be forgotten, and he comes in again and starts cursing and I got him on the back porch again and when I did get him on the back porch he somehow or other - I didn't want to hit him - somehow or other he got hold of my finger in his mouth and he was going to bite my finger off. Q. Did he bite your fingers? A. Yes, he did so I even was told at the police station to go ahead and go to the hospital and get that finger fixed up.

Q. What happened to your father, did he go away that night? A. I went down to the police station and when I got back with the police he was gone. Q. Where did you find him? A. We found him I believe on Western and 39th street. Q. Did you chase him out that night or did he go away? A. He went away. He was gone when I got back. Q. Did the police look for him? A. They took him to the station and I went to the station and I signed a complaint against him. Q. After he got out of the police station did he come back to live with you? A. No. Q. Where did he go to live? A. I don't know. Q. When did your father next come back? A. About a week after when he was over in the court in Berwyn. Q. Did he come back to live with you? A. He came the same night, he was supposed to come home right after the court before dinner and he first came that night. Q. How long did he live with you after that? A. I believe maybe about three or four weeks. Q. Was everything patched up and were you getting along all right? A. Well, everything was quiet, that is about all. There wasn't a good look from him for nobody. Q. Everything was quiet? A. Everything was quiet, he had all his meals, everything, breakfast, supper or dinner, he always had his meals with us. Q. What happened on the day that he left? A. Saturday night he was gone all day Saturday, he was gone that night, it was nine o'clock, ten o'clock, we were worried about him, he wasn't home. Well, he had his own key and at eleven o'clock we closed the door up and we went to sleep, we didn't know what was going to happen. Q. Yes. A. We worried about him whether he got killed or something like that and Sunday morning he walked in about nine o'clock. Q. Did you let him in that night. A. No sir, he come about nine o'clock that morning with a truck and comes into the house without saying a word, we didn't say nothing to him and he started to move everything he had right out in the truck. Q. Had you had an argument with your father the day before or anything? A. No sir. Q. Did you throw your father out? A. No sir. Q. Did you ask him where he was

Q. That happened to your father, did he go away that night? A.

I went down to the police station and I got back with the police he was gone. Q. Where did you find him? A. I found him

I believe on Western Ave. and I went to the station and I signed a complaint that night or did he go away? A. He went away. He was gone when

I got back. Q. Did the police look for him? A. They took him to the station and I went to the station and I signed a complaint

against him. Q. After he got out of the police station did he

come back to live with you? A. No. Q. Where did he go to live?

A. I don't know. Q. When did your father next come back? A. About

a week after when he got over in the lot in between. Q. Did he

come back to live with you? A. He came the same night, he was

supposed to come home right after the court before dinner and he

first came that night. Q. How long did he live with you after

that? A. I believe maybe about three or four weeks. Q. Was

everything normal in the house for you along all right? A.

Well, everything was quiet, but it was about all. There wasn't a good

look from him for nobody. Q. Everything was quiet? A. Everything

was quiet, he had all his meals, everything, breakfast, supper or

dinner, he always had his meals with us. Q. That happened on the

day that he left? A. Certainly what he was gone all day Saturday,

he was gone that night, it was about a'clock, and a'clock, we were

sort of alone him, he wasn't home. Well, he had his own key and

at eleven o'clock he showed the door in and he went to sleep.

He didn't show that was going to happen. Q. Yes. A. He worried

about his mother he got called at something like that and Sunday

morning he came in about nine o'clock. Q. Did you let him in

that night? A. No sir, he came about nine o'clock that morning

with a trunk and some things and he started saying a word, we

didn't say nothing to him and he started to move everything he had

right out in the trunk. Q. And you had no conversation with your

father that day before or afterwards? A. No sir. Q. Did you throw

your father out? A. No sir. Q. Did you see him there he was

going? A. No. Q. When did you next hear from your father after that? A. I didn't hear from him at all after that. Q. Never talked to him since then? A. No sir. Q. The next thing you knew this suit was started, is that right. A. Yes. Q. I think I asked you whether you were willing to take your father back to stay with you? A. Yes. *** Q. Now when your father left home that evening you didn't know where he went did you? A. He left home that morning. Q. But that evening when you had the trouble? A. No, I didn't. Q. In this scuffle that you had with him he got hurt didn't he? Did you know your father got a cut on his head in that scuffle? A. I seen that when I got to the station with him. Q. You didn't see that before? A. No sir. Q. He was all right when he left home was he, that is he didn't have a cut on his head or anything when he left? A. No. Q. Did you go out to look for him? A. Yes, I did after I got back with the police he was gone and I went out to look for him. Q. You first went down and got the police? A. Yes. Q. And you swore out a warrant for him? A. I just signed a complaint. Q. To have him arrested? A. Yes. Q. And did you see him again that evening after they found him? A. At the station. Q. You saw him at the station? A. Yes sir. Q. Who was there at that time? A. Well, just the policemen at the station and he was there and I. Q. And do you remember the police sergeant asking what you wanted to do with the old man and you said you didn't give a damn what happened to him? Do you remember that? A. I told him I don't want him home that night, to go ahead and keep him out here until he cools off, when he cools off to let him come home. Q. Isn't it a fact that you said to the police sergeant you didn't care what happened to him, you didn't want him? A. I didn't say that. Q. You left your father in jail that night? A. No, I didnt. Q. You didn't take him out? A. They took him right across the alley to the hospital. Q. And brought him back and locked him up in a cell didn't they? A. I don't think they did. Q. You didn't wait to

Q. Now, did you not know your father
 after that? A. I didn't know him at all after that. Q.
 never came to him afterwards? A. No sir. Q. The next thing
 you knew this man appeared, is that right? A. Yes, Q. I
 think I asked you whether you were willing to take your father
 back to work with you? A. Yes, Q. Now when your father
 left home that evening you didn't know where he went did you?
 He left home that evening, Q. and just evening when you had
 the trouble? A. No, I didn't. Q. In this matter that you had
 with him he got into that car, did you know your father got
 out on his head in that trouble? A. I don't know I got to
 the station with him. Q. Now didn't see that person? A. No sir.
 Q. He was all right when he left home and he, that is he didn't
 have a car on his head or anything when he left? A. No, Q. Did
 you go out to look for him? A. Yes, I did after I got back with
 the police on the phone and I went out to look for him. Q. You
 first went down and got the police? A. Yes, Q. And you swore
 out a warrant for him? A. I just signed a complaint. Q. To
 have him arrested? A. Yes, Q. And did you see him again that
 evening after that time? A. In the station. Q. You saw him
 at the station? A. Yes sir. Q. And you were at that time? A.
 Well, just the following is the station and he was there and I
 and he you remember the police sergeant asking you wanted to
 do with this man and you said you didn't give a damn what
 happened to him? A. You remember that? A. I told him I don't
 want him come that night, so he ahead and keep him out here until
 he cool off, when he cool off he let him home. Q. Isn't it
 a fact that you said to the police sergeant you didn't care what
 happened to him, you didn't want him? A. I didn't say that. Q.
 You left your father in jail that night? A. No, I didn't. Q. You
 didn't take him out? A. They took him right across the city to
 the hospital. Q. And straight the back and locked him up in a cell

see what they did with him did you? A. No, I went over to get my finger fixed. Q. Was your finger hurt very badly? A. Yes sir. Q. Any marks on it now? A. Yes. Q. Is that where your father bit it? A. Yes, it went right through, there are his teeth marks. *** Q. Who took care of that finger for you? A. A doctor. *** Q. What did he do for it? A. He went over and put two stitches on this side right here and dressed it all up for me. *** Q. Now, you were not present at the hearing on the complaint that you swore out against your father were you? A. No, the judge told me I don't have to. *** Q. Mr. Mruk, did your father have a key to all the houses that he lived in with you? A. As long as he lived with me in every one of the homes he had his own key. Q. Did he have a key to the house at Clinton Avenue? A. He still got it. *** Q. Did he have to wait for you that night to come home to get inside the house? A. He had his own key, he could have gotten in and could have helped himself to eats and all. Q. You never barred the doors and fixed it so that he couldn't get in even though he had a key? A. No sir."

Defendant Marie Mruk testified as follows: "Q. What was the argument about, was there an argument? A. Yes, there was. He called me dirty names. He was drunk and every time he would get drunk he thought he could come in and abuse me. Q. Did Mike throw him out that day? A. He just put him out on the porch and told him to stay there until he sobers up and he turned around and started hitting Mike. Q. Then did Mike go away? A. Mike went away and he started calling me dirty names again and he put him out again and that is when he put his finger in his mouth. Q. Do you know whether or not Mike went for the police? A. Yes, he went to the police station. He even called a neighbor there because he didn't want to hit his father *** Q. When did you next see him? A. It was a week after that. *** Q. Then did you see Mr. Stanley Mruk? A. Yes he came in that night then. Q. How long did he stay with you? A. Three weeks. Q. Now, between

[illegible]

the time that he came back from the police court and the time that he left, you say three weeks, were there any arguments between you and Mr. Stanley Mruk or between your husband and his father? A. No, everything was quiet, he never talked to nobody, he would come in for his meals, he would go out seven o'clock in the morning and come in eight or nine at night. I would warm his meals and he would go back out and when we went to bed he would come in and went to bed. He never spoke a word to any of us. Q. During the three weeks you still kept up the food, made his bed for him and washed his clothes for him, did you? A. Yes, I did. *** Q. Do you know any reason why he left you three weeks later? A. Yes, his son [Walter] told him to leave. *** Q. Did he give you any reason for leaving. A. There was no reason. Sunday morning the truck came and he started moving his stuff out of his bedroom, and he was all excited, he couldn't open the attic door and he started swearing at me. *** Q. He never came back? A. He never came back. Q. The next time you knew anything about this you were summoned? A. Yes, it was the next day."

It appeared that Walter Mruk went to the Berwyn police station sometime in the morning of July 24, 1938, and saw his father with cuts on his forehead and the back of his head; that Walter furnished bail for him and took him to his (Walter's) home; and that after his father left Mike's home in August, 1938, he moved to Walter's home, where he lived continuously for more than a year. Walter testified that his father caused no trouble while living at his home. He also testified that he had not seen his father ten times during the previous thirteen years.

Walter's wife, Anna Mruk, testified that she saw plaintiff on July 23, 1938, at a friend's home in Berwyn with cuts on his forehead and the back of his head; that her friend called the police, who removed him to the hospital for treatment; and that after plaintiff went to live at her home in August, 1938, he never caused her any

the time that he came back to the village and he was very
 he left, but my father was very angry and he was very
 and Mr. Kennedy was on the ground and he was very
 everything was done, and he was very angry and he was very
 for his wife, he was very angry and he was very
 in a lot of ways. I would like to see him and he was very
 back out and he was very angry and he was very
 he never spoke a word to any of us. I was very angry and he was very
 still kept up his work, and he was very angry and he was very
 for him, and he was very angry and he was very
 why he left his home and he was very angry and he was very
 him to leave. He was very angry and he was very
 There was no reason. He was very angry and he was very
 moving his wife out of the house, and he was very angry and he was very
 couldn't see the wife and he was very angry and he was very
 he never came back. He was very angry and he was very
 know anything about him and he was very angry and he was very
 next day."

It appeared that Walter was very angry and he was very
 station sometime in the morning of July 21, 1938, and he was very
 with cuts on his forehead and the back of his head; and he was
 furnished with his gun and took him to the hospital; and that
 after the doctor had seen him in the hospital, he was moved to
 Walter's home, where he lived continuously for two years.
 Walter continued to live in the same house and he was very
 his home. He also continued to live in the same house and he was very
 times during the previous fifteen years.
 Walter's wife, who was very angry and he was very
 on July 21, 1938, at a hospital in the city and he was very
 head and the back of his head; and he was very angry and he was very
 removed him to the hospital for treatment; and he was very
 went to live at his home in August, 1938. He never spoke a word

trouble and that he was "wonderful".

Anna Mruk later testified at the hearing before the master on the accounting on October 25, 1939, that plaintiff left her home two weeks previously to live with her mother; that "I tried to have him rake the leaves and sweep the sidewalk *** he didn't seem to want to do anything *** he got so moody *** I could not stand it;" and that she and Walter Mruk advanced \$30 to commence this suit.

As heretofore shown plaintiff's complaint charged that defendants Mike Mruk and his wife, fraudulently induced plaintiff to convey his property to them and that they made the various transfers and exchanges of property in furtherance of their scheme to cheat and defraud him. In plaintiff's brief his claim of fraud in the procurement of the transfer of the property to defendants is predicated upon the existence of a confidential relationship between him and his son Mike. It is repeatedly asserted therein that by reason of such relationship plaintiff reposed confidence in his son and that Mike abused such confidence and took advantage of his father by having the latter convey his property to defendants.

We have carefully searched the record and have failed to find therein a particle of evidence that even tends to show or from which it might be inferred that any fraud or undue influence was practiced by defendants to procure plaintiff to convey his property to them or that Mike Mruk abused any confidence reposed in him by his father or took advantage of him in any way. Neither is there any evidence in the record to support the finding in the decree "that the defendants were guilty of fraudulent intent in the first instance at the time plaintiff conveyed his property to them and that fraud and malice are the gist of the action."

On the contrary plaintiff himself testified that he voluntarily transferred his property to defendants with full knowledge of what he was doing. His wife had died some years previously. Walter Mruk, had not seen his father ten times in thirteen years. His only daughter and her husband had but recently evicted him from

trouble and that he was "sensible".

There was a letter written at the time of the trial.

On the morning of October 25, 1930, the defendant told Mr. Jones

ten weeks previously to him that he was going; that it was to have

him take the money and spend the money for his trip.

He went to do anything but to do so much as I could not find it.

and that he was after that money to go to Europe and stay.

As a matter of fact, the defendant's explanation was that

defendants with him and his wife, the defendant's father, the

to convey the property to him and that they were the owners

transfer and ownership of property in the name of their father

to cheat and defraud him. The defendant's wife at the time of trial

in the possession of the property of the property to the defendant

is provided upon the evidence of a confidential relationship

between him and his son. It is reported that the defendant

that by means of such relationship, the defendant's father

in his son and that they had been together and had been

of his father by having the father convey his property to the defendant.

He has certainly received the money and has failed to

find therein a particle of evidence that would lead to him or her

which it might be inferred that they had or in his possession was

practiced by the father to convey property to convey his property

to him or that the father should not have been exposed in his by

his father on some evidence of him in any way. There is no

evidence in the record to support the finding in the above that

the defendant was guilty of fraud in the fact that

at the time of the conveyance his property to him and that

and money was the fact of the matter.

On the contrary, the defendant's father, the

fully transferred his property to the defendant with full knowledge

of what he was doing. His wife was also very friendly.

After that, he had told his father and that in the same way.

their home, at which time he accepted his son Mike's invitation to make his home with defendants. The thing then uppermost in plaintiff's mind was to provide for the security of a home for himself during his lifetime and a decent burial when he died. It does not appear that Mike solicited his father to convey his property to him and Mike testified that he insisted that plaintiff retain the title to the property in himself upon several occasions when plaintiff suggested turning the property over to defendants. However, as already stated, early in September, 1935, Mike and his father went to see Joseph Klenha, a lawyer, whom plaintiff had known for many years, and he took "all the papers to the property" with him. Plaintiff testified that at that time "Klenha asked me if I want to sign that property to Mike *** I said if Mike will clothe me, gave me meals, place to stay and sleep and will care and take care of my funeral I would *** Klenha asked Mike will you agree what this man says and Mike says yes." Plaintiff then executed a deed to the property to Mike and his wife and he continued thereafter to live at his son Mike's home for three years without any complaint as to his treatment until July 23, 1938, when the altercation heretofore mentioned occurred.

Thus it clearly appears that prior to July 23, 1938, there was no fraud on the part of defendants and that Mike had neither abused any confidence reposed in him by his father or taken advantage of him in any way in so far as the property was concerned. It also clearly appears that prior to July 23, 1938, Mike Mruk carried out with the utmost good faith his contract with his father to provide for him in accordance with his means. Plaintiff had a room for himself, had his washing done, was furnished clothing as needed and ate his meals with Mike and his family. He did odd jobs at times in the neighborhood and during part of the time that he lived with Mike he received an old age pension.

The real question in this case is whether Mike Mruk by reason of the altercation which occurred on the evening of July 23,

their home, at which time he suggested that the family should
to make his home with them. The family then remained in
placidity, and was to provide for the security of a home for
himself and his children and a decent burial for his wife.
It does not appear that this satisfied him, for he never did
property to him and his wife, and he himself was placidly
retain the title to the property in himself, and several occasions
when placidly suggested during the property over to his wife.
However, as always, he was in the house, and his wife and his
father went to see to the house, a lawyer, and his wife and his
for many years, and he was still in the property, and he
him. Placidity himself was in the house, and he was still in
want to sign over property to him, and he was still in the
he, have no more, and he was still in the property, and he
one of the things I would like to see him do, and he was still
that he was still in the property, and he was still in the
been to the property to him, and he was still in the property,
after to live at his own home, and he was still in the property,
complaining to him, and he was still in the property, and he was
then placidly continued on.

There is clearly a great deal of time to him, and he was
was no time on the part of his wife and his father
shared his wife's property in him, and he was still in the property,
of his wife is as far as the property is concerned. It also
directly appears that he was still in the property, and he was
with the same good faith and sincerity as his father, and he was
for him in accordance with his wishes. Placidity had a room for his
sell, and his wife's house, and he was still in the property, and he was
his wife's house and his family. He also had a room for his
neighbors and during part of the time that he lived in the
he received on his own property.

The same question in this case is whether the wife by

1938, breached his contract to provide and care for his father.

As already stated plaintiff's only daughter and her husband threw him out of their home, his son Walter and his wife could not stand him and sent him away from their home where he had lived for a year after he finally left Mike's home and he claims to have been so abused and mistreated by defendants that it is no longer possible for him to live with them. While it is only natural to pity and sympathize with plaintiff because of his age and his present predicament, it would be highly unjust and inequitable to deprive defendants of their rights if they were not at fault merely because of such sympathy.

Just where do Walter Mruk and his wife fit in this picture? It appeared that Mike Mruk had sold some defaulted real estate mortgage bonds for \$200, which he testified his father had turned over to him. The first time that the son Walter Mruk, who had not theretofore been sufficiently interested in his father to see him more than ten times in thirteen years, appeared on the scene is shortly prior to July 23, 1938, when he accompanied his father to a lawyer's office in connection with Mike's sale of said bonds and also to the state's attorney's office to make a criminal complaint against Mike Mruk with reference thereto. Plaintiff was at Walter's home during the afternoon of July 23, 1938, where it is fair to assume his grievances, real or fanciful, against defendants were discussed and stressed. He moved to Walter's home when he finally left Mike's home and he left defendants' home, according to Mike's wife, because Walter "told him to leave." Walter's wife, Anna, testified that she and her husband advanced \$30 to commence this suit. Walter testified that plaintiff had no property "except the claim we are suing for." Both Walter and Anna testified that plaintiff was wonderful and caused no trouble in their home but Anna later testified that she could not stand him and had to send him to her mother's home. When Anna testified before the master on the hearing on the accounting she stated that plaintiff was indebted to her and Walter

1938, presented his consent to provide and care for his father.

As already stated, Plaintiff's only daughter and her husband threw him out of their home, his son left and his wife could not stand him and sent him away from their home where he had lived for a year after he finally left Mike's home and in doing so have been so abused and mistreated by defendants that it is no longer possible for him to live with them. While it is only a trial to city and sympathetic with Plaintiff because of his age and his present predicament, it would be highly unjust and impossible to deprive defendants of their rights if they were not at least merely because of such sympathy.

Just before Plaintiff and his wife left in this situation it appeared that Mike had sold some defendant real estate mortgage bonds for \$200, which he testified his father had turned over to him. The first time that the son left Mike, who had not there- before been officially interested in his father to see him more than ten times in thirteen years, appeared on the scene is shortly prior to July 15, 1938, when he accompanied his father to a lawyer's office in connection with Mike's sale of said bonds and also to the state's attorney's office to make a criminal complaint against Mike with reference thereto. Plaintiff was at Mike's home during the afternoon of July 25, 1938, when it is said to have been his birthday, real or fanciful, and that defendants were discussed and stressed. He moved to Mike's home when he finally left Mike's home and he left defendants' home, according to Mike's wife, because Mike told him to leave. Mike's wife, Mike, testified that she and her husband advanced \$10 to someone with Mike. Plaintiff testified that Plaintiff had no property except the said \$10 and was for. Both Mike and Mike testified that Plaintiff was wonderful and caused no trouble in their home but was later notified that the could not stand him and had to send him to her mother's home. Then Mike testified a love the mother on the hearing on the

for a year's room and board. We are constrained to believe that the trouble between Mike and his father on July 23, 1938, was largely due to the intermeddling of Walter and Anna Mruk and that they inspired and instigated this litigation, not so much for plaintiff's benefit as for their own.

Just what is the setting as to the altercation of July 23, 1938? In the first place the testimony of both defendants that plaintiff was "drunk" that evening was not denied by him and in our opinion little credence can be given to his version of what occurred. It is absolutely incredible that without the slightest reason or provocation Mike Mruk would maliciously and viciously attack his father and that Mike's wife and his seven and thirteen year old sons would join in such an attack, she with a chair and the children with knives and forks.

We are convinced from the evidence that defendants' version as to what occurred is true. According to their testimony they found plaintiff sitting on the rear porch when they returned to their home that evening from an automobile ride and Mike started to talk to his father as they entered the kitchen. Plaintiff followed them in like a "wild man" and called Mike's wife vile and "dirty" names. Mike endeavored to restrain his father without hurting him and finally succeeded in pushing him out on the back porch, where he thought he would remain until he "got sobered up and everything would be forgotten." But he did not stay on the back porch. He rushed in again cursing and Mike again "got him on the back porch" where, during the scuffling, he got Mike's finger in his mouth and bit it. Realizing that it was impossible to restrain his father and get him quiet, and not wanting to strike or injure him, Mike called a neighbor and they drove to the police station. When they returned with the policemen, plaintiff had gone. When he was located he had a cut on his forehead and also on his head. Mike said that he did not notice these cuts on his father before he went for the police. There is no evidence in the

for a year's time and beyond. It was common knowledge in the neighborhood that the trouble between him and his father on July 12, 1932, was largely due to the introduction of liquor into the house and that they fought and quarreled. This litigation, however, was not for Plaintiff's benefit as for their own.

Next what is the matter as to the situation of July 25, 1932? In the first place the testimony of both defendants that Plaintiff was "drunk" that evening was not denied by him and in our opinion these credences can be given to the version of what occurred. It is especially inadvisable to do without the slightest reason or provocation when such would naturally and vision of attack his father and that his wife and his seven and thirteen year old sons would join in such an attack, was with a chair and the children with knives and forks.

As we concluded from the evidence that "drunk" version as to what occurred is true. According to their testimony they found Plaintiff sitting on the rear porch when he attempted to leave home and coming from an automobile when he was arrested to talk to the father as they entered the kitchen. Plaintiff followed him in like a "wild man" and called him a "wild man" and "dirty" names. His endeavor to restrain his father without hurting him and finally succeeded in pushing him out on the back porch, where he thought he would remain until he "got sobered up" and everything would be forgotten. But he did not stay in the back porch. He reached in again causing his wife again "got into on the back porch" where, during the scuffling, he got his wife's finger in his mouth and bit it. Testimony that it was impossible to restrain his father and get him quiet, and not wanting to submit to injury him, like called a witness and they drove to the police station. When they returned with the witnesses, Plaintiff was gone. When he was located he had a cut on his forehead and also on his head. Like said that he did not realize where they were on the

record as to the nature and extent of the cuts and they may well have been scratches that he received during the scuffling. Mike and his father appeared at the police station after their injuries had been attended to at a hospital near by. Mike signed a complaint against his father so that he would be retained in custody for safe-keeping and until he became sober. Walter furnished bail for plaintiff sometime after midnight and took him to his home, where he remained until his trial on July 28, 1938. Mike was advised by the police magistrate not to attend the trial and his father was discharged.

Plaintiff returned to defendant's home on the evening of July 28, 1938, and continued to live there, as he stated, for about a week, but according to defendants for three or four weeks. Whichever it was, after remaining away from defendants' home over one Saturday night, he returned on Sunday morning with a truck, upon which he loaded his belongings and without giving any reason for so doing, he moved to Walter's home. This proceeding was instituted within a few days thereafter.

Defendants' agreed to care and provide for plaintiff in their home in accordance with their means. The evidence is conclusive that they performed their obligation under their contract in good faith. When plaintiff left defendants' home on the first occasion he did so as the result of the altercation in which he was the aggressor and which was due solely to his own intoxicated condition and abusive conduct. When he left the second time he did so voluntarily and we think because he was improperly influenced to do so by his son Walter.

Defendants State that they are perfectly willing to have plaintiff return and make his home with them. They are not obligated under their contract to maintain him outside their home and if plaintiff by his conduct makes it impossible for them to perform their contract, the fault is his and not theirs. We repeat that we have the utmost sympathy for plaintiff in his declining years, but merely

before he is taken and subject of the case and may well have been somewhere else in the vicinity during the investigation, and his father appeared at the police station after their investigation had been attempted to be a logical man. He said almost immediately that his father as they would be satisfied in order to be satisfied and until he was satisfied. He said that he was in the vicinity after midnight and took him to his home, where he remained until the late of July 1938. He was advised by the police magistrate not to attend the trial and the father was also charged.

Heinrich returned to defendant's home on the evening of July 28, 1938, and continued to live there, as he stated, for about a week, but according to defendant's father or some other, defendant is not, after remaining away from defendant's home over one or twenty night, he returned on Sunday morning with a trunk, upon which he loaded his belongings and returned to his home for so doing, he moved to father's home. This proceeding was interrupted within a few days thereafter.

Defendants' agent in court and provide for plaintiff in their home in accordance with their contract. The witness is also alive that they performed their obligations under their contract in good faith. The plaintiff left defendants' home on the first occasion as far as the rights of the defendant in this case was the agreement and which was the only one that was established and effective contract. He was left for several days in his so voluntarily and he found himself in an extremely unpleasant position so by his son Walter.

Defendants state that they are perfectly willing to have plaintiff return and make his home with them. They are not obligated under their contract to provide the plaintiff with food and if plaintiff by his contract makes it impossible for them to perform their contract, the fault is his and not theirs. He would like to have

because of that sympathy defendants should not be penalized when they have performed their contract and are still willing to perform it.

We are not unmindful of the rule that the findings and conclusions of the master as to the facts, when approved by the chancellor, should not be disturbed unless they are manifestly against the weight of the evidence. We are of opinion, however, that the findings and conclusions of the master and the decree entered thereon are clearly against the manifest weight of the evidence.

There is no question of fraud, constructive trust or fiduciary relationship in this case. As we have heretofore pointed out the only question necessary to be determined herein is whether defendants breached their contract with plaintiff to maintain and support him. Since Mike Mruk was not responsible for the altercation on July 23, 1938, and his father alone was, neither of the defendants breached the contract by reason of anything that occurred on that occasion. Plaintiff returned to defendants' home after his trial on July 28, 1938, and since after a period of from one to three weeks he left same voluntarily and without notice or any apparent reason to live with his son Walter, we find nothing in defendants' conduct or treatment of plaintiff during said period or in the circumstances surrounding his departure from their home that constituted a breach of the contract by defendants.

We do not want it understood from anything said in this opinion that defendants are in anywise released from their obligation to care and provide for plaintiff during the remaining years of his life. Defendants have had another child since this suit was started and Mike Mruk earns only \$26 a week. On that salary it is not reasonably possible for defendants to maintain plaintiff except in their home and that was their agreement. We deem it to be the duty of Mike Mruk to use all proper means to induce his father to return to live with him and we deem it to be his further duty, if and when he does return, to see to it that he is treated with kindness and con-

because of their testimony and the fact that they have performed their contract and are still willing to perform it.

We are not satisfied at this time that the findings and conclusions of the board as to the facts, and the character of the contract, should not be disturbed and they are satisfied against the intent of the evidence. We are of opinion, however, that the findings and conclusions of the board and the evidence entered through and directly against the contract of the evidence.

There is no question of fraud, constructive fraud or fiduciary relationship in this case. It is a contract between a contractor and the only question necessary to be determined herein is whether the contractor has performed his contract with the government and support him. This claim is not responsible for the government on July 25, 1946, and the contract was made, and the contractor has performed the contract by reason of which the contractor on that occasion. Plaintiff returned to defendant some other his claim on July 25, 1946, and since that time he has not been in the work he has voluntarily and without notice or any agreement reason to live with him and others, we find nothing in defendant's conduct or treatment of plaintiff which tends to be in the circumstances surrounding his departure from this case that constituted a breach of the contract by defendant.

We do not want to understand from this fact in this opinion that defendant is in any way released from their obligation to care and provide for plaintiff during the remaining years of his life. Defendant may not contract with anyone who has started and who has not only a work, in that regard it is not reasonable possible for defendant to maintain plaintiff's contract in their home and last was their agreement. We find it to be the duty of Mike Smith to use all proper means to induce his father to return to live with him and we find it to be his father's duty, if and when he

sideration by every member of the family.

We are impelled to hold under all the facts and circumstances in evidence that defendants did not violate their contract with plaintiff and that his complaint should have been dismissed for want of equity.

We have considered all the points urged but in the view we take of this case we deem further discussion unnecessary.

Plaintiff's motion heretofore made to dismiss this appeal, which was reserved to hearing, is at this time denied.

For the reasons stated herein the decree of the Circuit court is reversed and the cause is remanded with directions to dismiss plaintiff's complaint for want of equity.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

alteration by every member of the family.

It was impossible to hold either all the facts and figures

against in evidence that defendant had not shown such

respect with plaintiff and that the defendant would have been

dismissed for want of equity.

We have considered all the facts and figures and in the view

we take of this case we have found defendant's conduct

plaintiff's motion for judgment made to dismiss this

appeal, which was reserved to hearing, is on this day denied.

For the reasons stated herein the appeal of the plaintiff

is reversed and the cause is remanded with directions to

dismiss plaintiff's complaint for want of equity.

THE COURT OF APPEALS
AT THE CITY OF CHICAGO

Friend, J. J., and Council, J., concur.

41178

M. S. REICHELT,
Appellant,

CHARIN MOTOR SALES, Inc.,
a corporation, and UNITED
STATES FIDELITY & GUARANTY
COMPANY, a corporation,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

3111A.252

This action was originally brought by plaintiff, M.

S. Reichelt, as a proceeding in forcible detainer before a justice of the peace to secure the possession of the premises at 874 Green Bay road, Winnetka, Illinois, and judgment for possession was entered in favor of plaintiff. Defendant Chapin Motor Sales, Inc., posted a bond and perfected an appeal to the Superior court of Cook County from such judgment. After perfecting its appeal defendant vacated the premises at 874 Green Bay road. Plaintiff filed an amended complaint in the Superior court in which the United States Fidelity and Guaranty Company, the surety on the appeal bond, was made an additional party defendant. Both defendants filed answers to the amended complaint and after a trial by the court without a jury on the issues raised by the amended complaint and the answers thereto, the court found against the defendants and assessed plaintiff's damages at \$300. Judgment for that amount was entered and plaintiff appeals.

Plaintiff's theory "is expressed in his amended complaint wherein he alleged in Count 1: that he became entitled to the possession of the premises at 874 Green Bay road as of May 1, 1938, under a lease from the owner bearing date of February 21, 1938; that the defendant, Chapin Motor Sales, Inc., the tenant of said premises, under a lease expiring April 30, 1938, failed and refused to vacate the said premises when its lease expired and unlawfully withheld possession from the plaintiff; that by reason of this withholding,

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M. S. REINHOLD
Appellant

CHARLES M. O'NEILL, INC.
a corporation, and UNITED
STATES FIDELITY & GUARANTY
COMPANY, a corporation,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was originally brought by plaintiff, M. S. Reinhold, as a proceeding in forcible detainer before a justice of the peace to secure the possession of the premises at 874 Green Bay road, Winnetka, Illinois, and judgment for possession was entered in favor of plaintiff. Defendant Charles Motor Sales, Inc., posted a bond and perfected an appeal to the Superior court of Cook County from such judgment. After perfecting its appeal defendant vacated the premises at 874 Green Bay road. Plaintiff filed an amended complaint in the Superior court in which the United States Fidelity and Guaranty Company, the surety on the appeal bond, was made an additional party defendant. Both defendants filed answers to the amended complaint and after a trial by the court without a jury on the issues raised by the amended complaint and the answers thereto, the court found against the defendants and assessed plaintiff's damages at \$300. Judgment for that amount was entered and plaintiff appeals.

Plaintiff's theory "as expressed in his amended complaint wherein he alleged in Count I: that he became entitled to the possession of the premises at 874 Green Bay road as of May 1, 1938, under a lease from the owner bearing date of February 21, 1938; that the defendant, Charles Motor Sales, Inc., the tenant of said premises under a lease expiring April 30, 1938, failed and refused to vacate the said premises when its lease expired and unlawfully withheld

the plaintiff sustained the following specific items of damage:

"1. \$1,375 paid by the plaintiff to E. V. Skinner for rent of part of the premises at 562 Lincoln Avenue under a lease for eleven months from June 1, 1938.

"2. \$300 rent paid by plaintiff for the month of May, 1938, at 562 Lincoln Avenue.

*** and that he is entitled to recover the damages above set forth from the defendant, Chapin Motor Sales, Inc.

"The further theory of plaintiff's case, as expressed in Count 2 of his amended complaint, is that the defendant Chapin Motor Sales, Inc., by vacating the premises at 874 Green Bay Road during the pendency of its appeal from the Justice of the Peace Court to the Superior Court of Cook County, thereby acquiesced in the finding and judgment entered before said Justice of the Peace, abandoned its appeal, and failed to prosecute its appeal with effect, thereby creating a liability against itself and the United States Fidelity and Guaranty Company, surety on the appeal bond given to perfect its appeal to the Superior Court, for the amount stated in said bond."

The theory of the defendant Chapin Motor Sales, Inc., as stated in its brief is as follows:

"The defendant had a lease on the premises at 874 Green Bay Road, Winnetka, Illinois, which expired by its terms on April 30, 1938. Prior to the expiration of said lease it entered into a written agreement for a new lease with the lessor's agents, commencing May 1, 1938. Subsequent to this written agreement, the lessor's agent, without the knowledge of this defendant, entered into a lease with plaintiff for the same premises, which lease was to become operative on May 1, 1938. Upon defendant's failure to vacate on April 30, 1938, plaintiff obtained judgment in a Justice of the Peace Court for possession from which defendant appealed. Defendant vacated the premises on May 30, 1938, while

the plaintiff maintained the following specific items of damage:
"1. \$1,375 paid by the plaintiff to J. J. Winkler for
rent of part of the premises at 324 Green Bay Road
for eleven months from June 1, 1938.

"2. \$300 rent paid by plaintiff for two months of May,
1938, at 304 Lincoln Avenue.

Next and that he is entitled to recover the damages above
set forth from the defendant, Chicago Motor Sales, Inc.

"The further theory of plaintiff's case, as expressed
in Count 2 of his amended complaint, is that the defendant Chicago
Motor Sales, Inc., by vacating the premises at 324 Green Bay Road
during the pendency of its appeal from the finding of the lease
Court to the Superior Court of Cook County, thereby acquiesced in
the finding and judgment entered before said Justice of the Peace,
abandoned its appeal, and failed to prosecute its appeal with
effect, thereby creating a liability against itself and the United
Statesidelity and Guaranty Company, jointly on the appeal bond
given to perfect its appeal to the Superior Court, for the amount
stated in said bond."

The theory of the defendant Chicago Motor Sales, Inc., as
stated in its brief is as follows:

"The defendant had a lease on the premises at 324 Green
Bay Road, Waukegan, Illinois, which expired by its terms on April
30, 1938. Prior to the expiration of said lease it entered into
a written agreement for a new lease with the lessor's agents,
commencing May 1, 1938. Subsequent to said written agreement,
the lessor's agent, without the knowledge of said defendant,
entered into a lease with plaintiff for the same premises, which
lease was to become operative on May 1, 1938. Upon defendant's
failure to vacate on April 30, 1938, plaintiff obtained judgment
in a Justice of the Peace Court for possession from which defendant
appealed. Defendant vacated the premises on May 1, 1938, after

the appeal was pending.

"The plaintiff filed a counterclaim [an amended complaint] in the lower court seeking the recovery of damages for the withholding of possession. Subsequently, the defendant made a motion to dismiss the appeal because possession had been accepted by the plaintiff. The court overruled the motion to dismiss the appeal and set this cause for trial on the counterclaim [amended complaint] and answers filed thereto.

"The U. S. Fidelity & Guaranty Co. was made additional party to these proceedings as surety on the appeal bond.

"Defendant contends that it surrendered the premises pursuant to a verbal agreement with the plaintiff to dismiss the appeal and release the defendant from liability upon its bond. Defendant asserts that plaintiff in dereliction of his duty to minimize the damages did not attempt to dispose of the alleged lease with E. V. Skinner.

"The defendant did not intend to prosecute its appeal owing to the alleged verbal agreement with the plaintiff. Plaintiff's counterclaim [amended complaint], however, necessitated a continuance of the appeal to determine whether any damages were due to the plaintiff by virtue of the defendant's alleged conduct in withholding possession."

Both plaintiff, M. S. Reichelt, and Chapin Motor Sales, Inc., (hereinafter for convenience sometimes referred to as the defendant) were automobile dealers in Winnetka. May 1, 1938, plaintiff became entitled to the possession of the premises at 874 Green Bay road, Winnetka, as the lessee, under a written lease with Berea College, the owner of the property, which lease was executed February 21, 1938. Chapin Motor Sales, Inc., was in possession of said premises under a lease which expired April 30, 1938. Possession being withheld from plaintiff by defendant, the former instituted an action in forcible detainer against the latter

the appeal was pending.

"The plaintiff filed a counterclaim [an amended complaint] in the lower court seeking the recovery of damages for the withholding of possession. Subsequently, the defendant made a motion to dismiss the appeal because possession had been accepted by the plaintiff. The court overruled the motion to dismiss the appeal and set this case for trial on the counterclaim [amended complaint] and answers filed thereto.

"The U. S. Fidelity & Guaranty Co. was made additional party to these proceedings as surety on the appeal bond. "Defendant contends that it surrendered the premises pursuant to a verbal agreement with the plaintiff to dismiss the appeal and release the defendant from liability upon its bond. Defendant asserts that plaintiff in violation of his duty to minimize the damages did not attempt to dispose of the alleged lease with W. V. Skinner.

"The defendant did not intend to prosecute its appeal owing to the alleged verbal agreement with the plaintiff. Plaintiff's counterclaim [amended complaint], however, necessitated a continuance of the appeal to determine whether any damages were due to the plaintiff by virtue of the defendant's alleged conduct in withholding possession."

Both plaintiff, W. S. Reichelt, and Chapin Motor Sales, Inc., (hereinafter for convenience sometimes referred to as the defendant) were automobile dealers in Ann Arbor, May 1, 1938, plaintiff became entitled to the possession of the premises at 874 Green Bay road, Ann Arbor, as the lessee, under a written lease with Berea College, the owner of the property, which lease was executed February 11, 1936. Chapin Motor Sales, Inc., was in possession of said premises under a lease which expired April 30, 1938. Possession being withheld from plaintiff by defendant, the

on May 2, 1938, for possession of such premises before a justice of the peace. May 13, 1938, judgment for possession was entered in favor of plaintiff and against the defendant. May 18, 1938, Chapin Motor Sales, Inc., as principal, and the United States Fidelity and Guaranty Company, as surety, executed an appeal bond in the amount of \$1,500. Said bond was approved by the justice of the peace on May 18, 1938, and filed with the transcript of judgment in the Superior court of Cook county May 20, 1938, thereby perfecting the appeal from the judgment entered by the justice of the peace.

Prior to the commencement of the term of his lease at 874 Green Bay road, plaintiff carried on his business at 562 Lincoln avenue, under a lease with the Aetna Life Insurance Company, which expired April 30, 1938. When Chapin Motor Sales, Inc., failed to vacate the premises at 874 Green Bay road, plaintiff remained at 562 Lincoln avenue for the month of May, 1938, for which month he paid \$300 rent.

The evidence disclosed that the entire premises at 562 Lincoln avenue had been leased to one E. V. Skinner for a term commencing June 1, 1938; that May 23, 1938, after plaintiff had learned that the defendant had perfected its appeal from the judgment of the justice of the peace, he subleased a part of said premises from Skinner for eleven months, from June 1, 1938, to April 30, 1939, at a rental of \$125 a month; that on May 31, 1938, the defendant vacated the premises at 874 Green Bay road and surrendered them to plaintiff; and that on or about May 31, 1938, plaintiff moved from 562 Lincoln avenue to 874 Green Bay road.

Plaintiff presented evidence to show that by the sale and delivery of automobiles and equipment to Skinner and payment of cash to him or in his behalf, he paid Skinner \$1,375 for the eleven months rent due under the terms of his sublease at the rate of \$125 a month.

Plaintiff contends that "where possession of leased premises

on May 2, 1938, for possession of such premises before a judgment of the peace. May 12, 1938, judgment for possession was entered in favor of plaintiff and against the defendant. May 18, 1938, Chapin Motor Sales, Inc., as principal, and the United States Fidelity and Guaranty Company, as surety, executed an appeal bond in the amount of \$1,500. Said bond was approved by the justice of the peace on May 18, 1938, and filed with the transcript of judgment in the Superior Court of Cook County May 20, 1938, thereby perfecting the appeal from the judgment entered by the justice of the peace.

Prior to the commencement of the term of his lease at 874 Green Bay Road, plaintiff carried on his business at 562 Lincoln Avenue, under a lease with the Aetna Life Insurance Company, which expired April 30, 1938. When Chapin Motor Sales, Inc., failed to vacate the premises at 874 Green Bay Road, plaintiff remained at 562 Lincoln Avenue for the month of May, 1938, for which month he paid \$300 rent.

The evidence disclosed that the entire premises at 562 Lincoln Avenue had been leased to one E. V. Skinner for a term commencing June 1, 1938; that May 23, 1938, after plaintiff had learned that the defendant had perfected his appeal from the judgment of the justice of the peace, he vacated a part of said premises from Skinner for eleven months, from June 1, 1938, to April 30, 1939, at a rental of \$125 a month; that on May 31, 1938, the defendant vacated the premises at 874 Green Bay Road and subleased them to plaintiff; and that on or about May 31, 1938, plaintiff moved from 562 Lincoln Avenue to 874 Green Bay Road.

Plaintiff presented evidence to show that by the sale and delivery of automobiles and equipment to Skinner and payment of cash to him or in his behalf, he paid Skinner \$1,250 for the eleven months rent due under the terms of his sublease at the rate of \$125 a month.

is unlawfully withheld, damages are recoverable against the party unlawfully withholding the same, which may fairly and reasonably be considered as the natural and proximate result thereof; and which damages, special or otherwise, the party in default in the light of the circumstances should reasonably have known would result to the party entitled to possession from his acts in withholding the premises."

As heretofore shown, the judgment of the trial court awarded plaintiff \$300 damages, which amount he was compelled to pay as rent for the Lincoln avenue premises for the month of May, 1938, because the defendant withheld possession of the Green Bay road premises from him for said month. But plaintiff urges that he should have been allowed damages in the additional amount of \$1,375, which he claims he was required to pay as rent for a portion of the Lincoln avenue premises for the eleven months from June 1, 1938, to April 30, 1939, under his sublease from Skinner. He insists that he is entitled to the full amount of \$1,375, notwithstanding that he admits that he received \$50 rent for the Lincoln avenue premises for the month of October, 1938, from some political organization and that he occupied said premises himself during the months of January, February, March and April, 1939. In plaintiff's zeal to prove that he paid the eleven months rent due under the sublease, either by the payment of cash or the delivery of automobiles and equipment to Skinner, he enumerates items on pages 8 and 9 of his brief which indicate that he paid Skinner in the aggregate not \$1,375 but \$1,500, or in other words that he overpaid him \$125 in rent.

Several witnesses testified in defendant's behalf that plaintiff continued to use the show room at 562 Lincoln avenue during the entire period of his sublease for the display of his automobiles and that he did not at any time place a "For Rent" sign in said show room.

James L. Chapin, president of Chapin Motor Sales, Inc.,

is unlawfully withheld, damages are recoverable against the party unlawfully withholding the same, which may fairly and reasonably be considered as the natural and proximate result thereof; and which damages, special or otherwise, the party in default in the light of the circumstances should reasonably have known would result to the party entitled to possession from his acts in withholding the premises."

As heretofore shown, the judgment of the trial court awarded plaintiff \$300 damages, which amount he was compelled to pay as rent for the Lincoln Avenue premises for the month of May, 1938, because the defendant withheld possession of the Green Bay road premises from him for said month. But plaintiff urges that he should have been allowed damages in the additional amount of \$1,375, which he claims he was required to pay as rent for a portion of the Lincoln Avenue premises for the eleven months from June 1, 1938, to April 30, 1939, under his sublease from Skinner. He insists that he is entitled to the full amount of \$1,375, notwithstanding that he admits that he received \$50 rent for the Lincoln Avenue premises for the month of October, 1938, from some political organization and that he occupied said premises himself during the months of January, February, March and April, 1939. In plaintiff's zeal to prove that he paid the eleven months rent due under the sublease, either by the payment of cash or the delivery of automobiles and equipment to Skinner, he enumerates items on pages 8 and 9 of his brief which indicate that he paid Skinner in the aggregate not \$1,375 but \$1,500, or in other words that he overpaid him \$125 in rent.

Several witnesses testified in defendant's behalf that plaintiff continued to use the show room at 303 Lincoln Avenue during the entire period of his sublease for the display of his automobiles and that he did not at any time place a "For Rent" sign in said show room.

testified that when the defendant vacated and surrendered the Green Bay road premises on or about May 30, 1938, it did so pursuant to an oral agreement with plaintiff that in consideration of defendant's dismissal of his appeal from the justice of the peace to the Superior court, plaintiff would release defendant from liability on the appeal bond. Orian J. Galitz, testifying as a witness in defendant's behalf, corroborated Chapin in respect to said oral agreement.

Plaintiff denied that he entered into any such agreement with defendant and he also denied that he kept automobiles on display in the show room at 562 Lincoln avenue during the months from June to December, 1938. Plaintiff and Skinner testified that a "For Rent" sign was displayed in said show room during the entire term of the sublease.

It is undisputed that plaintiff gave no notice to defendant of his sublease of the Lincoln avenue premises until he filed his amended complaint in the Superior court June 12, 1939, which was after the expiration of said sublease.

We think both parties have overstressed in their briefs the proposition as to which of them had the burden of proof on the question of mitigation of damages in regard to the premises which plaintiff subleased and which he claims he did not occupy after June 1, 1938. In our opinion that question may be entirely disregarded in view of the issue of fact as to plaintiff's continued occupancy of the Lincoln avenue premises during the entire term of such sublease. If plaintiff occupied such premises himself throughout said term defendant could not be held liable to pay the rent for same. While there was a conflict in the evidence on this issue, there was ample evidence presented to justify a finding by the trial court that plaintiff did so continue to occupy the Lincoln avenue premises. This is also true of the issue of fact as to whether the parties agreed that plaintiff would release the defendant from lia-

testified that when the defendant vacated and surrendered the Green Bay road premises on or about May 30, 1938, it did so pursuant to an oral agreement with Plaintiff that in consideration of defendant's dismissal of his appeal from the Justice of the Peace to the Superior court, Plaintiff would release defendant from liability on the appeal bond. Urban J. Delita, testifying as a witness in defendant's behalf, corroborated Plaintiff in respect to said oral agreement.

Plaintiff denied that he entered into any such agreement with defendant and he also denied that he kept automobiles on display in the show room at 302 Lincoln Avenue during the months from June to December, 1938. Plaintiff and Skinner testified that a "For Rent" sign was displayed in said show room during the entire term of the sublease.

It is undisputed that Plaintiff gave no notice to defendant of his sublease of the Lincoln Avenue premises until he filed his amended complaint in the Superior court June 12, 1939, which was after the expiration of said sublease.

We think both parties have oversteered in their briefs the proposition as to which of them had the burden of proof on the question of mitigation of damages in regard to the premises which Plaintiff subleased and which he claims he did not occupy after June 1, 1938. In our opinion that question may be entirely disregarded in view of the issue of fact as to Plaintiff's continuing occupancy of the Lincoln Avenue premises during the entire term of such sublease. If Plaintiff occupied such premises during the term out said term defendant could not be held liable to pay the rent for same. While there was a conflict in the evidence on this issue, there was ample evidence presented to justify a finding by the trial court that Plaintiff did so continue to occupy the Lincoln Avenue premises. This is also true of the issue of fact as to whether the

bility on the bond furnished by it on the appeal from the justice of the peace in consideration of the dismissal of said appeal by defendant.

Where, as here, "the case is tried before the court without a jury, and the court has had an opportunity to hear the witnesses and to observe their demeanor while testifying, it is not within the province of the court of review to substitute its findings of fact for those of the trial court unless the findings of the trial court are manifestly against the weight of the evidence." Alton Banking & Trust Co. v. Alton People & Loan Ass'n, 289 Ill. App. 177. As already stated there is ample evidence in the record to support the finding and judgment of the trial court and "the Law has committed to the trial judge, where a cause is tried by the court without a jury, the determination of the credibility of the witnesses and of the weight to be accorded to their testimony, and where the evidence is merely conflicting this court will not substitute its judgment for that of the trial court." People v. Overbey, 362 Ill. 488.

No sound reason having been advanced as to why the judgment of the Superior court should be disturbed, same is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

ability on the point furnished by it on the appeal from the trial of the peace in consideration of the statement of said appeal by defendant.

Where, as here, "the case is tried before the court without a jury, and the court has had an opportunity to hear the witnesses and to observe their demeanor while testifying, it is not within the province of the court of review to substitute its findings of fact for those of the trial court unless the findings of the trial court are manifestly against the weight of the evidence." Alton People & Trust Co. v. Alton People & Loan Ass'n, 287 Ill. App. 177. As

already stated there is ample evidence in the record to support the finding and judgment of the trial court and "the law has committed to the trial judge, where a cause is tried by the court without a jury, the determination of the credibility of the witnesses and of the weight to be accorded to their testimony, and where the evidence is merely conflicting this court will not substitute its judgment for that of the trial court." People v. Overbay, 302 Ill. 486.

No sound reason having been advanced as to why the judgment of the Superior court should be disturbed, same is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

41231

SAMUEL P. MILLER, doing
business as ALL-VAC STEAM
CONTROL SYSTEM,

Appellant,

v.

110 SOUTH DEARBORN STREET
CORPORATION, a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

3111.A.252²

~~MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.~~

This action was brought by plaintiff, Samuel P. Miller, doing business as All-Vac Steam Control System, to recover from defendant, 110 South Dearborn Street Corporation, the contract price for the alleged use by said defendant of the All-Vac Steam Control System, a patented process of which plaintiff was the inventor and owner. The case was tried by the court without a jury and judgment was entered against plaintiff. This appeal followed.

Plaintiff's statement of claim alleged that he entered into a written contract with defendant, which was dated February 1, 1936; that under and by virtue of the terms of said contract he "furnished design, specification and supervision of construction for the installation of an All-Vac Steam Control System on the steam lines in operation by defendant in its building located at 110 South Dearborn Street, Chicago, Illinois;" that said contract provided in part as follows:

"If said guarantee has not been substantially fulfilled and the party of the second part shall on or before May 1st, 1936, permanently remove said system from said steam lines and building, notifying said party of the first part in writing that the party of the second part so intends, then at its option it shall be relieved from any and all obligation to pay any sum or sums of money mentioned in this contract, and any and all agreements based upon this contract shall thereupon become null and void and of no further effect. The party of the second part further agrees that should it come to the conclusion that the guaranteed saving or an amount in excess of the guaranteed savings of Ten (10%) per cent has not been made, it will provide the party of the first part with complete and accurate data on the steam used during the past year or that portion of the year in which the All-Vac Steam Control System has been in operation in said building."

SAMUEL P. MILLER, Plaintiff,
 vs.
 ALL-VAC STEAM CONTROL SYSTEM, Defendant.

COURT OF CHICAGO,
 CHICAGO, ILLINOIS.

110 SOUTH DEARBORN STREET,
 CHICAGO, ILLINOIS, a corporation,
 Defendant.

THE JUSTICE OF THE PEACE IN AND FOR THE COUNTY OF CHICAGO.

This action was brought by plaintiff, Samuel P. Miller, doing business as All-Vac Steam Control System, to recover from defendant, 110 South Dearborn Street Corporation, the contract price for the alleged use by said defendant of the All-Vac Steam Control System, a patented process of which plaintiff was the inventor and owner. The case was tried by the court without a jury and judgment was entered against plaintiff. This appeal followed.

Plaintiff's statement of claim alleged that he entered into a written contract with defendant, which was dated February 1, 1936; that under and by virtue of the terms of said contract he "furnished design, specification and supervision of construction for the installation of an All-Vac Steam Control System on the steam lines in operation by defendant in its building located at 110 South Dearborn Street, Chicago, Illinois;" that said contract provided in part as follows:

"It said guarantee has not been substantially fulfilled and the party of the second part shall on or before May 1st, 1936, permanently remove said system from said steam lines and building, notifying said party of the first part in writing that the party of the second part so intends, then at its option it shall be relieved from any and all obligation to pay any sum or sums of money mentioned in this contract, and any and all agreements based upon this contract shall thereupon become null and void and of no further effect. The party of the second part further agrees that should it come to the conclusion that the guaranteed saving or an amount in excess of the guaranteed savings of ten (10%) per cent has not been made, it will provide the party of the first part with complete and accurate data on the steam used during the past year or that portion of the year in which the All-Vac Steam Control System was installed on the steam lines and building."

The statement of claim further alleged that "the defendant has not removed said system from the steam lines nor has the defendant notified the plaintiff in writing of its intention so to do, but on the contrary the said All-Vac System was connected to the steam lines of said building during the entire term of said contract;" that "in accordance with said agreement, the defendant agreed to pay to the plaintiff \$200 May 1, 1936, \$200 May 1, 1937, \$200 May 1, 1938, and \$200 May 1, 1939, making a total of \$800;" and that "no part of said total has been paid and although often requested to pay the same, the defendant has refused and neglected so to do." The complaint concluded with a prayer for judgment against defendant for \$800 with interest thereon.

Defendant's verified statement of defense denied that plaintiff performed his obligations as provided in the contract and that plaintiff's system was connected with the pipes and steam lines in defendant's building during the entire term of the contract. It then averred that defendant had permanently disconnected plaintiff's system from its steam lines and discontinued the use thereof and that it had given plaintiff written notification to that effect prior to May 1, 1936; that plaintiff knew or should have known that defendant's building "was heated by means of pipes or steam lines without the use of any mechanically sufficient vacuum and without the employment of any equipment which was capable of mechanical operation in conjunction with said All-Vacuum Steam Control System or which could result in any substantial or profitable saving to this defendant by reason of its use;" and that defendant did not at any time accept but, on the contrary, rejected plaintiff's system because no substantial saving was effected by its use.

The contract which was attached to and made a part of plaintiff's statement of claim and which was received in evidence

The statement of claim further alleged that "the defendant has not removed said system from the steam lines nor has the defendant notified the plaintiff in writing of its intention so to do, but on the contrary the said All-Vac system was connected to the steam lines of said building during the entire term of said contract;" that "in accordance with said agreement, the defendant agreed to pay to the plaintiff \$200 May 1, 1936, \$200 May 1, 1937, \$200 May 1, 1938, and \$200 May 1, 1939, making a total of \$800;" and that "no part of said total has been paid and although often requested to pay the same, the defendant has refused and neglected so to do." The complaint concluded with a prayer for judgment against defendant for \$800 with interest thereon.

Defendant's verified statement of defense denied that plaintiff performed his obligations as provided in the contract and that plaintiff's system was connected with the pipes and steam lines in defendant's building during the entire term of the contract. It then averred that defendant had permanently disconnected plaintiff's system from its steam lines and discontinued the use thereof and that it had given plaintiff written notification to that effect prior to May 1, 1936; that plaintiff knew or should have known that defendant's building "was heated by means of pipes or steam lines without the use of any mechanically sufficient vacuum and without the employment of any equipment which was capable of mechanical operation in conjunction with said All-Vacuum Steam Control System or which could result in any substantial or profitable saving to this defendant by reason of its use;" and that defendant did not at any time accept but, on the contrary, rejected plaintiff's system because no substantial saving was effected by its use.

The contract which was attached to and made a part of

is as follows:

"(Letterhead of)

ALL-VAC STEAM CONTROL SYSTEM

Builders Building

Chicago, Illinois

110 So. Dearborn St. Corp., Date February 1, 1936

110 South Dearborn St.,

Chicago, Illinois

Number 11.

License Agreement

"Whereas Samuel P. Miller has invented certain new and useful improvements in Self-regulated Heat Transfer Systems for which he filed an application for Letters Patent of the United States, identified as his attorney's Docket No. 17,501, and an application for Letters Patent of the United States on Heat Transfer Systems, his attorney's Docket No. 17,667, and is the sole owner of same and all rights thereunder, and is now licensing the installation of said systems and doing business under the name of All-Vac Steam Control System, hereafter referred to as the party of the first part, and 110 So. Dearborn Street Corporation, the licensee, shall be hereafter referred to as the party of the second part. The above attorney's Docket No. 17,501 refers to Commissioner of U. S. Patents Application Serial No. 699,557.

"The party of the first part hereby agrees to furnish, design, specification, and supervision of construction for the installation of the said All-Vac Steam Control System on the steam lines heretofore supplied with steam through one certain Five (5) Inch High Pressure Reducing Valve, now in operation at the above mentioned building at the address given. The party of the first part guarantees that the said steam control system when installed will effect a substantial and profitable saving in the cost of the operation of said steam lines over the system heretofore used; and this agreement shall include a license for the use of the inventions of said Samuel P. Miller when installed with his approval and direction.

"It is further agreed that the saving made in the operation of the said All-Vac Steam Control System shall be computed on the basis of the fuel requirement per degree day in comparison with the fuel requirement per degree day of the heating season of 1934-1935.

"If said guarantee has not been substantially fulfilled and the party of the second part shall on or before May 1st, 1936, permanently remove said system from said steam lines and building, notifying said party of the first part in writing that the party of the second part so intends, then at its option it shall be relieved from any and all obligation to pay any sum or sums of money mentioned in this contract, and any and all agreements based upon this contract shall thereupon become null and void and of no further effect. The party of the second part further agrees that should it come to the conclusion that the guaranteed saving or an amount in excess of the guaranteed saving of Ten (10%) Per Cent. has not been made, it will provide the party of the first part with complete and accurate data on the steam used during the past year

18 22 10107

(of letterhead)

U. S. GOVERNMENT PRINTING OFFICE: 1964

Officers Building

Chicago, Illinois

110 So. Dearborn St.
110 So. Dearborn St. Corp.,
Date February 1, 1936

110 South Dearborn St.

Chicago, Illinois
August 11.

ЛЕСОУГОЩА ОТЕЧЕЛІ

Serial No. 075,557.
No. 17,501 refers to Commission of U. S. Patents Application
the above attorney's booklet. The party of the second part,
Street Corporation, the license, shall be a written request to
referred to as the party of the first part, and the Do. Desbourn
under the name of All-Vacuum Control System, Inc.
licensing the installation of said system and doing business
the sole owner of same and all rights thereunder, and is now
Heat Transfer Systems, his attorney's booklet No. 17,507, and is
and an application for Letters Patent of the United States on
United States, identified as his attorney's booklet No. 17,501,
for which he filed an application for Letters Patent of the
and useful improvements in a self-regulated heat transfer system
" refers Samuel P. Miller has invented certain new

his approval and direction. of the inventions of said Samuel L. Miller when installed with force used; and this agreement shall include a license for the use of the operation of said steam lines over the system hereinbefore installed. It is further agreed that the said steam control system shall be installed with effect a contract and profitably as well in the the first part guarantees that the said steam control system shall be installed in the above mentioned building at the earliest given. The party of Five (5) Inch High Pressure Working Valve, now in operation at steam lines heretofore supplied with steam on a certain installation of the said All-Sea Steam Control System on the design, specification, and supervision of construction for the "The party of the first part hereby agrees to furnish

100A-1032
The full narrative and other documents of the day of the arrest of
_____ of the _____, _____, _____, _____
_____ of the said All-Vac _____ control _____ and _____ on the
_____ "It is further stated that the _____ in the _____ of

[illegible]

or that portion of the year in which the All-Vac Steam Control System has been in operation in said building.

"The party of the first part herein assumes all liability for any patent infringement which may arise from the use of the All-Vac Steam Control System as specified by the party of the first part, and agrees to defend at its own expense any infringement suits of any kind. First party further agrees to indemnify and save harmless the second party from any loss, cost, damage or expense arising out of any litigation involving infringement, the party of the first part having exclusive control over all patent litigation respecting said Device, including the right to choose counsel and conduct defense.

"Part II

"The party of the first part hereby states for your guidance for comparison that the following results in the use of the said All-Vac Steam Control System when properly installed and operated, should be expected:

"(1) A co-ordination throughout the entire radiation system by means of a small connecting static line to establish a cycle therein, whereby the law of gravity will operate to the elimination of mechanical force to exert a major or super control over the reducing valve commensurate with the condensation in the entire heating system.

"(2) The entire radiation system will be tied in a multiple series whereby the reducing valve will respond instantly to any and all local conditions in the entire steam lines or system, supplying steam or vapor as required at quite the same pressure and temperature and at a low velocity while eliminating expansion of same throughout the steam lines.

"(3) That there should be no material alterations or shut-downs required in the installation of the All-Vac Steam Control System.

"(4) That there should be a profitable saving in the cost of steam over the cost heretofore required, of at least Ten (10%) Per Cent.

"It is further agreed that if the saving guaranteed in this agreement of Ten (10%) Per Cent. is substantiated, then the party of the second part agrees to make payments to the party of the first part in the following amounts on the dates named when the respective amounts shall become due and payable:

Two Hundred Dollars (\$200) on May 1st, 1936,
Two Hundred Dollars (\$200) on May 1st, 1937,
Two Hundred Dollars (\$200) on May 1st, 1938,
Two Hundred Dollars (\$200) on May 1st, 1939,
Total payments to be Eight Hundred (\$800) Dollars.

"All payments to be made to All-Vac Steam Control System, Chicago, Illinois.

"A discount of Six (6%) Per Cent. on the balance due after May 1st, 1936, will be allowed if paid in full on or before that date.

"This agreement shall not be modified or changed except in writing and shall include the whole and entire agreement between

or that portion of the year in which the All-Vac steam control system has been in operation in said building.

"The party of the first part herein assumes full liability for any patent infringement which may arise from the use of the All-Vac steam control system as so cited by the party of the first part, and agrees to defend at its own expense any infringement suits of any kind. First party further agrees to indemnify and save harmless the second party from any loss, cost, damage or expense arising out of any litigation involving infringement, the party of the first part having exclusive control over all patent litigation respecting said device, including the right to choose counsel and conduct defenses.

"Part II

"The party of the first part hereby states for your guidance and for comparison that the following details in the use of the said All-Vac steam control system when properly installed and operated, should be expected:

"(1) A co-ordination between the entire radiation system by means of a small connecting static line to establish a cycle therein, whereby the law of gravity will operate to the elimination of mechanical forces to create a major or minor control over the radiating valve commensurate with the condition in the entire heating system.

"(2) The entire radiation system will be tied in a multiple series whereby the radiating valve will respond instantaneously to any and all local conditions in the entire steam lines or system applying steam or vapor as required to raise the steam pressure and temperature and at a low velocity while eliminating expansion of same throughout the steam lines.

"(3) That there should be no material fluctuations or shut-downs required in the installation of the All-Vac steam control system.

"(4) That there should be a practically a vapor in the cost of steam over the cost of hot water radiators, or at least Ten (10) per cent.

"It is further agreed that if the vapor warranted in this agreement of Ten (10) per cent. is not obtained, then the party of the second part agrees to make payments to the party of the first part in the following amounts on the dates named when the respective amounts shall become due and payable:

- "Two hundred dollars (\$200) on May 1st, 1935
- "Two hundred dollars (\$200) on May 1st, 1936
- "Two hundred dollars (\$200) on May 1st, 1937
- "Two hundred dollars (\$200) on May 1st, 1938
- "Two hundred dollars (\$200) on May 1st, 1939
- "Total payments to be Eight Hundred (\$800) dollars.

"All payments to be made to All-Vac steam control system, Chicago, Illinois.

"A discount of six (6) per cent. on the balance due after May 1st, 1936, will be allowed if paid in full on or before that date.

"This agreement shall not be modified or changed except in writing and shall be binding on the whole and without delivery of a copy of this agreement to the party of the first part.

the parties hereto and is not valid until approved by the owner of the inventions, Samuel P. Miller.

"It is further mutually agreed that if the party of the second part defaults in any payment herein provided for or decides against accepting said system, then this contract shall become null and void and the further use of the system shall constitute infringement entitling the party of the first part to a preliminary and permanent injunction against its further use.

"Signed by the party of the second part at the City of Chicago, Ill., this 10 day of Febr. A. D. 1936, and by the party of the first part at the City of Chicago, Illinois, this 11 day of Feb., A. D. 1936. (*Italics ours.*)

"Respectfully submitted
By C. L. Dickerson,
General Manager

"Approved: Feb. 11, 1936.

"All-Vac Steam Control System
By Samuel P. Miller,
Party of the First Part,
Owner and Inventor.

"110 South Dearborn Street Corp.
By D. M. Baum, agent,
Party of the Second Part."

Plaintiff was the owner of a United States patent covering a heat transfer process called the All-Vac Steam Control System, which he claimed would, if installed in connection with the heating system in defendant's building, cause a reduction in its heat consumption with a resultant saving of at least 10% in the cost of heating said building. Miller had an arrangement with one C. L. Dickerson whereby the latter was licensed to sell the use of said system and under said arrangement plaintiff was to receive 50% of the contract price on every "license agreement" negotiated by Dickerson. With plaintiff's consent and approval Dickerson had cards printed, which read: "Franklin 2096 ALL-VAC STEAM CONTROL SYSTEM Not Inc. Builders Building Chicago. C. L. Dickerson, General Manager."

Dickerson presented one of such cards to the managing agent of defendant's building and thereafter negotiated the written contract with defendant, heretofore set forth. The contract was drafted on plaintiff's printed form by his attorney and Miller, who was the

the parties hereto and is not valid until approved by the owner of the invention, Samuel F. Miller.

"It is further stipulated that if the party of the second part defaults in any payment herein provided for or fails to pay the party of the first part, then this contract shall become null and void and the further use of the system shall constitute infringement and the party of the first part to a preliminary and permanent injunction against its further use."

"Witness by the party of the second part at the City of Chicago, Ill., this 10 day of Apr. A. D. 1936, and by the party of the first part at the City of Chicago, Illinois, this 11 day of Feb., A. D. 1936. (It lists ours.)"

"Respectfully submitted
By G. L. Dickerson,
General Manager

"Approved: Feb. 11, 1936."

"All-Vac Steam Control System
By Samuel F. Miller,
Party of the First Part,
Owner and Inventor."

"110 South Dearborn Street Corp.
By D. E. Banta, agent,
Party of the Second Part."

Plaintiff was the owner of a United States patent covering a heat transfer process called the All-Vac Steam Control System, which he claimed would, if installed in connection with the heating system in defendant's building, cause a reduction in its heat consumption with a resultant saving of at least 10% in the cost of heating said building. Miller had an arrangement with one G. L. Dickerson whereby the latter was licensed to sell the use of said system and under said arrangement plaintiff was to receive 75% of the contract price on every "license agreement" negotiated by Dickerson. With plaintiff's consent and approval Dickerson had cards printed, which read: "Franklin 4036 All-Vac Steam Control System Not Inc. Building Building Chicago, G. L. Dickerson, General Manager."

Dickerson presented one of such cards to the managing agent of defendant's building and thereafter negotiated the written contract with defendant, heretofore set forth. The contract was drafted on plaintiff's printed form by his attorney and Miller who was the

last of the parties to execute same, did so on February 11, 1936. It required about a week or ten days to install plaintiff's system in defendant's building. Defendant purchased the material necessary for its installation, consisting of about 200 feet of half inch pipe and two special thermostatic valves, and a plumber and an electrician in its employ installed the system under the direction and supervision of Miller and Dickerson. Plaintiff's system was given every opportunity to function properly. Dickerson even brought in an additional vacuum pump and had same attached to the steam lines, but still the system did not and could not be made to work satisfactorily. Defendant's plumber and electrician and Dickerson all testified that the system had been operated intermittently in conjunction with defendant's steam lines from the time of its installation in February, 1936, until the latter part of April, 1936; and that, notwithstanding that plaintiff, as well as themselves, used every effort to make it work satisfactorily, their efforts were unavailing and that the system was disconnected from said steam lines during the last week of April, 1936, and was not thereafter used in connection with same.

It will be noted that under that portion of the contract set forth in plaintiff's statement of claim, defendant was the sole judge from the date of the installation of the system until May 1, 1936, as to whether it worked satisfactorily and effected the guaranteed saving and that in order to cancel the contract and relieve itself from liability for payment of the contract price, all that defendant was required to do was to remove the system from its steam lines and notify plaintiff in writing of such removal. One Baum, who was the managing agent of defendant's building and executed the contract in its behalf, having left defendant's employ and his whereabouts being unknown, was not available as a witness. However, Dickerson testified that a letter in longhand from Baum addressed to the All-Vac Steam Control System was received by him in his office in the Builders Building shortly

last of the parties to execute same, did so on February 11, 1936. It required about a week or ten days to install plaintiff's system in defendant's building. Defendant purchased the material necessary for its installation, consisting of about 200 feet of half inch pipe and two special thermostatic valves, and a plumber and an electrician in its employ installed the system under the direction and supervision of Miller and Dickerson. Plaintiff's system was given every opportunity to function properly. Dickerson even brought in an additional vacuum pump and two more attached to the steam lines, but still the system did not and could not be made to work satisfactorily. Defendant's plumber and electrician and Dickerson all testified that the system had been operated intermittently in conjunction with defendant's steam lines from the time of its installation in February, 1936, until the latter part of April, 1936; and that, notwithstanding that plaintiff, as well as themselves, used every effort to make it work satisfactorily, their efforts were unavailing and that the system was disconnected from said steam lines during the last week of April, 1936, and was not thereafter used in connection with same.

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before May 1, 1936, that he read same and that he then delivered said letter to plaintiff, who retained it, saying, "It was too bad but there wasn't anything to be done about it." This letter not having been produced in response to notice to plaintiff's attorneys to produce same, Dickerson testified that it stated that "The 110 Building Corporation were going to discontinue the use of the All-Vac steam control system because it had not made good its guarantee and that the heating condition was not as they desired." Plaintiff testified that Dickerson did not deliver the letter to him at any time and that he had no knowledge of the receipt of such letter.

At the conclusion of the hearing the trial judge, after stating that he would "make some findings of fact now," found inter alia that "the system of the All-Vac Steam Control System was on the premises and was being used in December, 1937," and that "the court finds no convincing evidence that a notice in writing was sent to the plaintiff on or before May 1, 1936." Notwithstanding such findings, thereafter on December 1, 1940, the trial court found the issues in favor of defendant and entered the judgment herein against plaintiff. In view of the above quoted findings, which were in favor of plaintiff, the judgment must necessarily have been based on Miller's failure to prove that his system worked satisfactorily and effected the guaranteed saving.

Plaintiff's theory is stated in his brief as follows: "It is the plaintiff's theory of the case that the contract, which is the basis of the suit, must be considered in its entirety; that under the terms of the contract the defendant by certain acts, consisting of notification and removal of the system before May 1, 1936, could avoid all obligations and be relieved of any liability to pay the contract price; that the defendant did not avoid the contract and by keeping the system upon its premises after May 1, 1936, it became obligated to pay the contract price of \$800 in four yearly

before May 1, 1936, that he read same and that he then delivered said letter to plaintiff, who retained it, saying, "It was too bad but there wasn't anything to be done about it." This letter not having been produced in response to notice to plaintiff's attorneys to produce same, Dickerson testified that it stated that "The 110 Building Corporation were going to discontinue the use of the All-Vac steam control system because it had not made good its guarantee and that the heating condition was not as they desired." Plaintiff testified that Dickerson did not deliver the letter to him at any time and that he had no knowledge of the receipt of such letter.

At the conclusion of the hearing the trial judge, after stating that he would "make some findings of fact now," found inter alia that "the system of the All-Vac Steam Control System was on the premises and was being used in December, 1935," and that "the court finds no convincing evidence that a notice in writing was sent to the plaintiff on or before May 1, 1936." Notwithstanding such findings, the court on December 1, 1940, the trial court found the issues in favor of defendant and entered the judgment herein against plaintiff. In view of the above stated findings, which were in favor of plaintiff, the judgment must necessarily have been based on Miller's failure to prove that his system worked satisfactorily and effected the guaranteed saving.

Plaintiff's theory is stated in his brief as follows: "It is the plaintiff's theory of the case that the contract, which is the basis of the suit, must be considered in its entirety; that under the terms of the contract the defendant by certain acts, commencing with notification and removal of the system before May 1, 1936, could avoid all obligations and be relieved of any liability to pay the contract price; that the defendant did not avoid the contract and by keeping the system upon the premises after May 1, 1936, it became obligated to pay the contract price of \$800 in four yearly

installments of \$200 each, the first installment being due May 1, 1936. No payment on account of the contract price was made. That while under the contract the plaintiff guaranteed a specific saving of ten per cent on the defendant's cost of heat, the fulfillment of said guaranty is not a condition precedent to plaintiff's right to recover, and, furthermore, that even if said guaranty might be considered as a condition precedent, the defendant's action in failing to take advantage of the opportunity to avoid the contract, and in continuing to keep the system in its premises for over a year and a half, was an admission that the guaranteed saving had been substantially complied with or at least should be considered as a waiver of the guaranty."

Plaintiff's position is predicated entirely upon the findings of fact of the trial court that "no convincing evidence that a notice in writing was sent to plaintiff on or before May 1, 1936," and that "the system of the All-Vac Steam Control System was on the premises and was being used in December, 1937." By reason of such findings plaintiff argues that "the defendant did not avoid the contract and by keeping the system upon its premises after May 1, 1936, it became obligated to pay the contract price" and that "the defendant's action in failing to take advantage of the opportunity to avoid the contract and in continuing to keep the system in its premises for over a year and a half was an admission that the guaranteed saving had been substantially complied with or at least should have been considered as a waiver of the guaranty."

It must be remembered that plaintiff's system was nothing more than his patented idea and that all the equipment necessary to carry that idea into effect was purchased and installed by defendant. To show its dissatisfaction with the system, and to avoid its obligations under the contract, it was not necessary for defendant physically to remove said equipment from its building but merely to disconnect same from its steam lines and to refrain

installments of \$200 each, the first installment being due May 1, 1936. No payment on account of the contract price was made. That while under the contract the plaintiff guaranteed a specific saving of ten per cent on the defendant's cost of heat, the fulfillment of said guaranty is not a condition precedent to plaintiff's right to recover, and, furthermore, that even if said guaranty might be considered as a condition precedent, the defendant's action in failing to take advantage of the opportunity to avoid the contract, and in continuing to keep the system in its premises for over a year and a half, was an admission that the guaranteed saving had been substantially complied with or at least

should be considered as a waiver of the guaranty."

Plaintiff's position is predicated entirely upon the findings of fact of the trial court that "no convincing evidence that a notice in writing was sent to plaintiff on or before May 1, 1936," and that "the system of the All-Year Steam Control System was on the premises and was being used in December, 1937." By reason of such findings plaintiff argues that "the defendant did not avoid the contract and by keeping the system upon its premises after May 1, 1936, it became obligated to pay the contract price" and that "the defendant's action in failing to take advantage of the opportunity to avoid the contract and in continuing to keep the system in its premises for over a year and a half was an admission that the guaranteed saving had been substantially complied with or at least should have been considered as a waiver of the guaranty." It must be remembered that plaintiff's system was nothing

more than his patented idea and that all the equipment necessary to carry that idea into effect was purchased and installed by defendant. To show its dissatisfaction with the system, and to avoid its obligations under the contract, it was not necessary for defendant physically to remove said equipment from its building

thereafter from using it. There can be no question but that defendant's sole purpose in entering into the contract was to procure the benefit of the saving of at least 10% in the cost of heating its building, which plaintiff specifically guaranteed, and it is fair to assume that if plaintiff's system demonstrated during its trial period that such a saving would be effected, defendant would have been satisfied with its performance, would have continued to use it and would have made the payments provided for in the contract.

Regardless of the actual relationship that existed between plaintiff and Dickerson, in so far as this transaction is concerned Miller is estopped from denying that Dickerson was his agent since he permitted Dickerson to hold himself out as such by allowing him to use the title "General Manager" of the All-Vac Steam Control System, both on his business cards and in connection with his signature to the contract. While it is true that plaintiff denied receiving defendant's written notice of the removal of the system from its steam lines on or prior to May 1, 1936, it is undisputed that Dickerson received such notice prior to that date and plaintiff is bound by the notice to his agent. In our opinion the findings of the trial court that there was "no convincing evidence that a notice in writing was sent to plaintiff on or before May 1, 1936," and that "the system of the All-Vac Steam Control System was on the premises and was being used in December, 1937," were manifestly against the weight of the evidence. Notwithstanding these erroneous findings, we think the record furnishes ample grounds for the affirmance of the judgment.

Is plaintiff entitled to recover without any showing that his system worked satisfactorily and that he complied with his guarantee to reduce defendant's heating cost by at least 10% by the use of said system? We think not. Plaintiff neither alleged nor made any attempt to prove that his system when installed worked

thereafter from using it. There can be no question but that defendant's sole purpose in entering into the contract was to procure the benefit of the saving of at least 10% in the cost of heating its building, which plaintiff specifically guaranteed, and it is fair to assume that if plaintiff's system demonstrated during its trial period that such a saving would be effected, defendant would have been satisfied with its performance, would have continued to use it and would have made the payments provided for in the contract.

Regardless of the actual relationship that existed between plaintiff and Dickerson, in so far as this transaction is concerned Miller is estopped from denying that Dickerson was his agent since he permitted Dickerson to hold himself out as such by allowing him to use the title "General Manager" of the All-Vac Steam Control System, both on his business cards and in connection with his signature to the contract. While it is true that plaintiff denied receiving defendant's written notice of the removal of the system from its steam lines on or prior to May 1, 1936, it is undisputed that Dickerson received such notice prior to that date and plaintiff is bound by the notice to his agent. In our opinion the findings of the trial court that there was "no convincing evidence that a notice in writing was sent to plaintiff on or before May 1, 1936," and that "the system of the All-Vac Steam Control System was on the premises and was being used in December, 1935," were manifestly against the weight of the evidence. Notwithstanding these erroneous findings, we think the record furnishes ample grounds for the affirmance of the judgment.

Is plaintiff entitled to recover without any showing that his system worked satisfactorily and that he complied with his guarantee to reduce defendant's heating cost by at least 10% by the use of said system? We think not. Plaintiff neither alleged

satisfactorily or that it accomplished the guaranteed saving in defendant's heating costs, the very purpose for which it was installed. It was shown conclusively by undisputed evidence that during the trial period up to May 1, 1936, notwithstanding the combined efforts of plaintiff, Dickerson and defendant's employees, the system could not be made to work properly and it is highly significant that neither plaintiff himself nor anyone in his behalf testified that his system did work satisfactorily. Statements of steam consumption covering the months of February, March and April in 1935 and 1936 furnished by the Illinois Maintenance Company, from which company defendant purchased its steam, disclosed that plaintiff's system while in use not only did not reduce defendant's steam consumption but that it increased same. Dickerson testified that the statements of the Illinois Maintenance Company for the months of February and March in 1935 and 1936 were delivered to him for examination and that he in turn showed them to plaintiff. Miller denied that he ever saw these statements but as heretofore shown Dickerson was his agent in this transaction and delivery of the statements to him was sufficient.

Plaintiff specifically guaranteed that his system would save defendant at least 10% on its heating costs not only during the trial period but during the entire life of the contract and it would be preposterous to hold defendant liable under the contract when plaintiff made no attempt to prove either that his system worked satisfactorily or that it resulted in any saving and when defendant's undisputed evidence is conclusive that while the system was in use its consumption and cost of steam increased rather than decreased. It is fundamental that one who seeks to recover on a contract must allege and prove performance on his own part in accordance with its terms. In our opinion performance of plaintiff's obligation under the contract to install a system that would effect a guaranteed saving of at least 10% to defendant was a condition

satisfactorily or that it accomplished the intended saving in defendant's net time costs, the very purpose for which it was installed. It was shown conclusively by undisputed evidence that during the trial period up to May 1, 1936, notwithstanding the combined efforts of plaintiff, Dickerson and defendant's employees the system could not be made to work properly and it is highly unlikely that neither plaintiff himself nor anyone in his behalf testified that his system did work satisfactorily. Statements of steam consumption covering the months of February, March and April in 1935 and 1936 furnished by the Illinois Maintenance Company, from which company defendant purchased the steam, disclosed that plaintiff's system while in use not only did not reduce defendant's steam consumption but that it increased same. Dickerson testified that the statements of the Illinois Maintenance Company for the months of February and March in 1935 and 1936 were delivered to him for examination and that he in turn showed them to plaintiff. Plaintiff denied that he ever saw these statements but as heretofore shown Dickerson was his agent in this transaction and delivery of the statements to him was sufficient.

Plaintiff specifically guaranteed that his system would save defendant at least 10% on its heating costs not only during the trial period but during the entire life of the contract and it would be preposterous to hold defendant liable under the contract when plaintiff made no attempt to prove either that his system worked satisfactorily or that it resulted in any saving and when defendant's undisputed evidence is conclusive that while the system was in use its consumption and cost of steam increased rather than decreased. It is fundamental that one who seeks to recover on a contract must allege and prove performance on his own part in accordance with its terms. In our opinion performance of plaintiff's obligation under the contract to install a system that would effect a guaranteed saving of at least 10% to defendant was a condition

precedent to plaintiff's right to recover. In the absence of any proof of plaintiff's compliance with his guarantee the ultimate finding for defendant was proper and the judgment thereon must be affirmed.

We have considered all the points urged by the parties and the authorities cited but in the view we take of this case we deem further discussion unnecessary.

For the reasons stated the judgment of the Municipal court is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

present to plaintiff's right to recover. In the absence of any proof of plaintiff's compliance with his guarantee the right to make finding for defendant was proper and the judgment thereon must be affirmed.

We have considered all the points urged by the parties and the authorities cited but in the view we take of this case we deem further discussion unnecessary.

For the reasons stated the judgment of the municipal court is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Benjamin, J., concur.

41484

311 I.A. 253¹

STANLEY MRUK,

Appellee,

v.

MIKE MRUK and MARIE MRUK,
Appellants.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing in this court with case No. 41123, the opinion in which is this day filed.

The decree in that case found the equities in favor of plaintiff, Stanley Mruk, on his complaint against defendants Mike Mruk and Marie Mruk, ordered an accounting between the parties and rereferred the cause to the master for the purpose of making such accounting.

During the pendency of the appeal in case No. 41123 the master made his report on the accounting and pursuant thereto the trial court entered a decree which approved the recommendations of the master except as to certain credits allowed defendants, and which, after allowing defendants certain other credits, ordered the entry of a judgment for \$6,126.57 against said defendants. The decree further ordered that the property now owned by defendants be sold and the balance of the proceeds of the sale after the payment of the master's fees and costs "be turned over to plaintiff to apply on the said judgment." This appeal is from the foregoing decree entered pursuant to the accounting.

Since in case No. 41123 we have reversed the original decree, which found the equities in favor of plaintiff and ordered the accounting between the parties before the master, it necessarily follows that the decree based on such accounting, from which the instant appeal was taken, must be reversed.

DECREE REVERSED.

Friend, P. J., and Scanlan, J., concur.

3111A.253

41434

STANLEY MURK, Appellee,	{	MR. JUSTICE SULLIVAN delivered the opinion of the court.
MINE MURK and MARIE MURK, Appellants.		

This appeal was consolidated for hearing in this court with case No. 41123, the opinion in which is this day filed.

The decree in that case found the equities in favor of plaintiff, Stanley Murk, on his complaint against defendants Mike Murk and Marie Murk, ordered an accounting between the parties and referred the cause to the master for the purpose of making such accounting.

During the pendency of the appeal in case No. 41123

the master made his report on the accounting and pursuant thereto the trial court entered a decree which approved the recommendations of the master except as to certain credits allowed defendants, and which, after allowing defendants certain other credits, ordered the entry of a judgment for \$6,120.75 against said defendants.

The decree further ordered that the property now owned by defendants be sold and the balance of the proceeds of the sale after the payment of the master's fees and costs "be turned over to plaintiff to apply on the said judgment." This appeal is from the foregoing decree entered pursuant to the accounting.

Since in case No. 41123 we have reversed the original decree, which found the equities in favor of plaintiff and ordered the accounting between the parties before the master, it necessarily follows that the decree based on such accounting, from which the instant appeal was taken, must be reversed.

DECREE REVERSED.

Friend, P. J., and Scamman, J., concur.

7525

AT A TERM OF THE APPELLATE COURT,
Begun and held at Ottawa, on Tuesday, the 6th day of May, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice
HON. BLAINE HUFFMAN, Justice
HON. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

311 I.A. 253²

103

=====

BE IT REMEMBERED, that afterwards, to-wit: On JUL 9 1941
the Opinion of the Court was filed in the Clerk's Office of
said Court, in the words and figures following, viz:

102

IS

IN THE
APPELLATE COURT OF ILL.
SECOND DISTRICT
MAY TERM, A. D. 1911

B. ETHEL HEEB and MARY HEEB,
Plaintiffs (Petitioners),
vs.
JAMES H. HEEB,
Defendant (Respondent).

VS.

WOLFE, -- P.M.

Petition for leave
to appeal from an
order of the Circuit
Court of Stephenson
County granting a
new trial.

John C. Heeb, Ethel Heeb and Mary Heeb each procured judgments against the defendant, Walter W. Graff, in the Circuit Court of Stephenson County, for damages they alleged to have sustained by reason of an automobile collision between the car in which the Heeb's were riding, and the car of the defendant, which was parked on a hard road in Stephenson County.

The complaint filed alleged that the plaintiffs and each of them were in the exercise of reasonable and ordinary care for their own safety while riding in an automobile, which was being driven by John C. Heeb, when the said automobile ran into the car of the defendant, and each of them were injured. They charged that the defendant was guilty of one or more of the following negligent, careless and unlawful acts of omissions: "(a) Parking and stopping his automobile upon the pavement of the highway without leaving a

IN THE
COURT OF COMMONS
HOLDEN
JANUARY 1, A. D. 1941

JOHN C. HEBB, Plaintiff,
vs.
WALTER W. GRAY, Defendant.
Motion for leave
to amend the
plea of the
defendant to
deny the
charge of
negligence.

WILLIAMS, J. P. 1.

John C. Hebb, Plaintiff, and Walter W. Gray, Defendant, have each presented motions against the defendant, Walter W. Gray, in the District Court of Stephenson County, Iowa, and the said motions are now pending by reason of an automobile collision between the car in which the Hebb were riding, and the car of the defendant, which was parked on a hand road in Stephenson County.

The complaint filed in the District Court and each of them were in the exercise of reasonable and ordinary care for their own safety while riding in an automobile, which was being driven by John C. Hebb, when the said responsibility ran into the car of the defendant. They charged that the defendant was guilty of one or more of the following negligent, careless and unlawful acts of omission: (a) Driving and operating his automobile upon the pavement of the highway without leaving a

clear and unobstructed width of at least twenty feet on such part of the highway opposite such standing vehicle and where there was a clear view of said stopped vehicle from a distance of 200 feet in each direction upon such highway, when it was possible for defendant to have avoided stopping said automobile on said pavement, contrary to Illinois Revised Statutes, Chapter 95½, paragraph 185. (b) Permitting or causing his automobile to be and remain upon said highway unlighted and unguarded, in the nighttime and during a rainstorm thereby leaving a ponderous and inherently dangerous agency upon said highway and endangering the lives of all users thereof, contrary to Illinois Revised Statutes, Chapter 95½, paragraphs 200 and 202 (Abst. 2-4);" and, that as a proximate result thereof, the plaintiffs and each of them received personal injuries, and the plaintiff, John C. Heeb's automobile was damaged.

The defendant filed his answer and denied all acts of negligence, carelessness and unlawful acts and omissions in the operation of his automobile, as set forth in the complaint. The answer further states that the rear tire on the defendant's automobile was flat, and on account of said flat tire and condition of the shoulder of the road, the defendant stopped his automobile on the southerly or right half of the pavement to fix the tire, To the defendant's answer, the plaintiffs filed a reply, issues were joined and the case heard before a jury. After the jury had returned their verdict in favor of the appellants, the defendant filed a motion for a new trial. The Court granted the motion for a new trial, and it is from this order that this appeal is prosecuted.

The abstract contains the decision of the Court at the time he passed upon the motion for a new trial, and it discloses that he was not satisfied with the evidence in the case, especially that of the testimony given by one of the plaintiff's John C. Heeb. After commenting upon the evidence of Mr. Heeb, the Court concludes with the following: "I think that speech of Heeb's is damaging, consequently, the Court is not satisfied with the verdict under the evidence, and the motion for a new trial is sustained."

An examination of the evidence as abstracted discloses, that on several occasions Mr. Heeb volunteered information that was not responsive to the question propounded to him. The main objection is to his response to the question, "Tell the jury what you next saw and did." To which he answered, "I turned my car in the left lane going east to pass the object, and in approaching it I noticed a second object along the left side rear wheel. It wasn't clear what the object was, but as I approached it, I realized that it was an object which I could not pass, so I started to turn back to the right lane, and then the object arose, and I realized it was a man who had been in that position, evidently looking at the left rear wheel, and the thought flashed through my mind, -- I decided I would take the chance of risking my life, and the lives of my mother and sister."-- The attorney for the defendant objected to this, and the Court very properly sustained the objection. Then Mr. Heeb volunteered, "I turned back to avoid the second object."

The trial judge not only heard the evidence, but saw the witnesses and how they appeared upon the witness stand, and was

The witness recalls the location of the Court at the time he passed upon the motion for a new trial, and it is disclosed that he was not satisfied with the evidence in the case, especially that of the testimony given by one of the witnesses, John C. Hest. After commenting upon the evidence of Mr. Hest, the Court concluded with the following: "I think that because of Hest's testimony, and because the Court is not satisfied with the verdict under the evidence, and the motion for a new trial is sustained."

An examination of the evidence as introduced discloses that on several occasions Mr. Hest volunteered information that was not responsive to the question propounded to him. The main objection is to his responses to the question, "Tell the jury what you saw and did." To which he answered, "I turned my car in the left lane going west to pass the object, and in response- ing I noticed a second object along the left side rear wheel. It wasn't clear what the object was, but as I approached it, I realized that it was an object which I could not pass, so I started to turn back to the right lane, and then the object crossed, and I realized it was a man who had been in the position evidently looking at the left rear wheel, and the witness finished almost as if I decided I could take the chance of making my life, and the lives of my mother and sister." -- The attorney for the defendant objected to this, and the Court very properly sustained the objection. Then the Court asked, "I turned back to avoid the second object."

The trial judge not only heard the evidence, but saw the witnesses and how they appeared upon the witness stand, and was

in a much better position to judge what effect the incompetent evidence may have had upon the jury in arriving at their verdict, than a Court of Review. The Trial Court has a broad discretion in granting motions for a new trial. This Court will not reverse the case unless it appears to us that the discretion has been clearly abused. In the present case, Mr. Heeb has injected into the evidence matters which should not properly be brought before the jury, and the statements and suggestions which he made were not responsive to any question propounded to him by his attorney.

The order of the Trial Court in granting the defendant a new trial is hereby affirmed.

Affirmed.

in a much better position to judge what effect the introduction of evidence may have upon the jury in arriving at their verdict, than a Court of Review. The Trial Court was a good deal more in granting motions for a new trial. This Court will not reverse the case unless it appears to us that the discretion has been clearly abused. In the present case, Mr. Nash has introduced into the evidence matters which are not properly to be brought before the jury, and the statements and suggestions which he made were not responsive to any question propounded to him by his attorney.

The order of the Trial Court in granting the defendant a new trial is hereby affirmed.

1891.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of May, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

- Present -- the HON. FRED G. WOLFE, Presiding Justice
HON. BLAINE HUFFMAN, Justice
HON. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

311 I.A. 254

932

=====

BE IT REMEMBERED, that afterwards, to-wit: On JUL 9 1941
the Opinion of the Court was filed in the Clerk's Office of
said Court, in the words and figures following, viz:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, 1941.

JOSEPH ANTOSZ, ET AL.,

APPELLEES.

vs.

GOSS MOTORS, INC., a

Corporation, and CARL

L. BROWN,

APPELLANTS

APPEAL FROM THE CIRCUIT

COURT OF DuPAGE COUNTY.

HUFFMAN, J.

This is a suit by appellees against appellants to recover for personal injuries and property damage sustained by the collision of an automobile owned and driven by the plaintiff, Joseph Antosz, with an automobile owned by appellant corporation, and driven by appellant Brown. Trial by jury resulted in verdicts for appellees as follows: Verdict for Joseph Antosz in the sum of \$500; verdict for Josephine Antosz in the sum of \$100; verdict for Jean Luberdia in the sum of \$100; verdict for Josephine Luberdia in the sum of \$900; and verdict finding Joseph Antosz not guilty as to the counterclaim of appellant motor corporation. Appellants bring this appeal from judgments entered on the verdicts.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DIVISION

1931

JOSEPH ANTON, JR. vs.

GOSS MOTORS, INC.

Corporation, and CARL

L. BROWN,

APPELLANTS

HUTCHMAN, J.

This is a writ by appellees against appellants to recover

for personal injuries and property damage sustained by the
collision of an automobile owned and driven by the plaintiff,
Joseph Anton, with an automobile owned by appellees and
driven by appellant Brown. Trial by jury resulted

in verdicts for appellees as follows: Verdict for Joseph
Anton in the sum of \$500; verdict for Josephine Lubers in the
sum of \$100; verdict for Louis Lubers in the sum of \$100;
verdict for Josephine Lubers in the sum of \$500; and verdict
finding Joseph Anton not guilty as to the compensation of
appellant motor corporation. Appellees bring this appeal
from judgments entered on the verdicts.

The accident occurred at about eleven o'clock on the night of December 3rd, 1938. Appellant Brown was in the employ of the Goss Motor Company, as salesman. The car being driven by Brown at the time of the accident was the property of the defendant, motor company.

Appellant motor company contended that the car being driven by Brown at the time of the accident, was being driven for his own pleasure, and that at such time, he was in no way acting as the agent of defendant corporation. The proof of the respective parties to the suit is, that while they were in their own proper traffic lane, the other came across the black line and ran into them. The impossibility of this situation is at once apparent. Under such circumstances, the cars could have no more collided than if they were standing still.

Under such circumstances, it is the function of the jury to pass upon the credibility of the witnesses. In addition to this, the trial court had the advantage of seeing and hearing them testify. The case was tried by an able and experienced trial judge, who approved the evidence.

We find no errors assigned for reversal by appellants. However, the record has been examined, and this court is of the opinion the judgments should be affirmed.

Judgments affirmed.

The accident occurred at about eleven o'clock on the night of December 31st, 1938. Appellant Brown was in the employ of the Coca-Cola Company, as witness. The car being driven by Brown at the time of the accident was the property of the defendant, motor company.

Appellant motor company contended that the car being driven by Brown at the time of the accident, was being driven for his own pleasure, and that at such time, he was in no way acting as the agent of defendant corporation. The proof of the respective parties to the suit is, that while they were in their own proper traffic lane, the other came across the black line and ran into them. The impossibility of this situation is at once apparent. Under such circumstances, the car could have no more collided than if they were standing still. Under such circumstances, it is the function of the jury to pass upon the credibility of the witnesses. In addition to this, the trial court had the advantage of seeing and hearing them testify. The case was tried by a jury and experienced trial judges, who approved the evidence.

We find no errors assigned for a reversal of appellant. However, the record has been examined, and this court is of the opinion the judgments should be affirmed.

Judgments affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

9665

128

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of May, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

311 I.A. 254²

=====

BE IT REMEMBERED, that afterwards, to-wit: On JUL 9 1941
the Opinion of the Court was filed in the Clerk's Office of
said Court, in the words and figures following, viz:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, 1941.

THE FIRST NATIONAL BANK OF
CHILLON, a Corporation, etc.,

APPELLEE,

vs.

ALFRED H. CHANDLER,

APPELLANT.

APPEAL FROM THE CIRCUIT
COURT OF IROQUOIS COUNTY.

HUFFMAN, J.

This is an appeal from a judgment by confession entered in the Circuit Court of Iroquois County. Appellant files his motion to vacate, set aside, and hold for naught the judgment rendered, "for the reason that the warrants of attorney attached to the several notes in said complaint mentioned was a joint and not a several warrant of attorney."

The disposition of this case is controlled by Holmes v. Partridge, 375 Ill. 521, decided since the appeal was taken herein. The judgment is therefore affirmed.

Judgment affirmed.

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

Abstract

FILED

MAY 31 1941

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A.D. 1941

Term No. 41F9

Agenda No. 9

311 I.A. 293

ROSIE RUSSELL

Plaintiff-Appellee,

v.

VICTORIA RAPNOWSKI,

Defendant-Appellant.

Appeal from
the City Court
of West Frankfort,
Illinois.

CULBERTSON, J.

This is an appeal from a judgment for possession of premises in a forcible entry and detainer action, entered in the City Court of West Frankfort, Illinois, in favor of Appellee, ROSIE RUSSELL (hereinafter called plaintiff), and against APPPELLANT, VICTORIA RAPNOWSKI (hereinafter called defendant).

The action was originally instituted in the court of a Justice of the peace in Frankfort Township, and thereafter taken by a change of venue to another Justice in the same township. After judgment was rendered in favor of plaintiff in such court, an appeal was taken by defendant to the City Court of West Frankfort, Illinois.

FILED

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CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

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Form No. 100

FOURTH DISTRICT

RECEIVED

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THIS IS TO CERTIFY THAT THE FOLLOWING IS A TRUE AND CORRECT COPY OF THE

ORIGINAL AS THE SAME WAS FILED IN THE OFFICE OF THE CLERK OF THE APPELLATE COURT

CITY OF CHICAGO, ILLINOIS, ON MAY 18, 1937.

ATTEST: CLERK OF THE APPELLATE COURT, FOURTH DISTRICT OF ILLINOIS.

CLERK OF THE APPELLATE COURT, FOURTH DISTRICT OF ILLINOIS.

The within and foregoing are true and correct copies of the

original as the same were in my possession and control on the date of filing.

A CORRECT COPY OF THE ORIGINAL IS BEING FURNISHED TO THE COURT.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL OF OFFICE

AT CHICAGO, ILLINOIS, THIS 18TH DAY OF MAY, 1937.

The plaintiff had been in possession of the premises involved in the forcible entry and detainer action by reason of the fact that her husband had entered into a contract to purchase the premises prior to the time of his death. There was evidence that the plaintiff continued in possession of the premises and that no action was ever brought to forfeit or cancel the contract of purchase. The evidence for plaintiff shows that while she was temporarily away from her home the defendant took possession of the premises after having first obtained a deed from the owner of the premises, with whom the plaintiff's deceased husband had a contract for deed. The action was thereupon instituted to recover possession of the premises on the theory that a forcible entry of the premises was made by the defendant while the premises were in the possession of the plaintiff.

It is contended by defendant in this Court that the Trial Court erred in entering judgment in favor of plaintiff and against defendant, and in ordering restitution of the premises, for the reason that the requirements of the Forcible Entry and Detainer Act were not complied with and are not present under the facts, and it is likewise contended that the Justice Court in which the case was tried, as well as the City Court, were without jurisdiction by reason of the fact that the plaintiff and defendant both resided in the same township (in which there are qualified Justices of the Peace), and that the action was commenced in another township in the same county, in violation of Paragraph 13a, Chapter 73, 1939 ILLINOIS REVISED STATUTES.

While it is contended quite specifically in the brief of defendant that objection was made at all times to the jurisdiction of the Justice Court and of the City Court of Franklin County, by

way of motion to dismiss, the plaintiff states that no objection was made to the jurisdiction of the Justice before whom the case was tried. We have searched the Record and are unable to find any record of an objection made on the ground of incorrect venue prior to the filing of a motion to vacate judgment in the City Court of West Frankfort other than the application for change of venue which does not raise the issue which defendant seeks to raise in this court which motion was made after the judgment had been entered in that Court following the trial of the case on appeal. Under the circumstances, we must conclude that defendant has waived the question of venue.

As to the right to maintain a forcible entry and detainer action, under the facts it must be recognized that mere default under the terms of the contract was not in issue and could not have been raised as a defense in this case, and that it was not proper to try or determine legal title of the premises in such action (SHILLMAN v. MOSER, 284 Ill. 134). The defendant could stand in no better position than the grantor in her deed would have stood had he himself attempted such entry.

There is some conflict in the evidence as to whether or not the deed had actually been in defendant's possession at the time of the entry, but for the purposes of this case, it is unnecessary that we consider such matter. The Trial Court could have properly concluded that the entry, under the facts, was made against the will of the plaintiff and while she was in possession of the premises (BUGNER v. CHICAGO TITLE & TRUST CO., 280 Ill. 620), and while plaintiff was temporarily absent from her home (PHILLIPS v. RANDOLPH, 147 Ill. 335).

Under the circumstances the judgment of the City Court of West Frankfort, Illinois must be affirmed.

Not to be published
in brief

Judgment Affirmed.

Wm. H. Wood

Abstract

FILED

MAY 31 1941

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

February Term, A. D. 1941

311 I.A. 294

Term No. 41F13

Agenda No. 3.

CITY OF FAIRFIELD,

Plaintiff-Appellee,

v.

SEXTON MANUFACTURING COMPANY,
A CORPORATION,

Defendant-Appellant.

Appeal from
Circuit Court
Wayne County.

CULBERTSON, J.

This is an appeal from a judgment entered in the Circuit Court of Wayne County, on June 20, 1940, in the amount of \$5,154.59, together with interest and costs, in favor of the Plaintiff-Appellee, CITY OF FAIRFIELD (hereinafter called plaintiff), and against Defendant-Appellant, SEXTON MANUFACTURING COMPANY, a Corporation (hereinafter called defendant). Motions for New Trial and In Arrest of Judgment were made and overruled, and this appeal follows.

The case was tried before the Court, without a jury. Plaintiff's suit was brought to recover : (First) The payment of a note given by defendant to plaintiff for electrical services furnished

Abstract

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CLERK OF THE APPELLATE COURT
SOUTH DISTRICT OF ILLINOIS

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by plaintiff to defendant prior to April, 1935; (Second) For electrical service furnished by plaintiff to defendant from April, 1935 to July, 1936, inclusive; and, (Third) For water furnished and supplied by plaintiff to defendant.

It was agreed by counsel for the parties that plaintiff had furnished water to defendant of the value of \$1556.05, for which defendant had not paid plaintiff. It was further admitted by the defendant that plaintiff had furnished defendant with kilowatt hours of electrical current as charged in plaintiff's complaint, but defendant claims not to owe plaintiff therefor for reasons hereinafter set forth.

Defendant contended and sought to avoid liability as to the note sued on on the ground that its execution was unauthorized by the Board of Directors of the defendant corporation, and that the same was secured by duress and extortion; and further sought to avoid liability as to plaintiff's charge for electrical current furnished by plaintiff to defendant from April, 1935 to July 1936, for the reason that an improper rate was being charged therefor.

Defendant, by its cross-complaint, charged that it had been compelled by duress and extortion to pay overcharges to the plaintiff city in the sum of \$30,872. 02, and prayed judgment against the City of Fairfield in the amount of \$25,996.61, after allowing the plaintiff city all credits to which it was entitled under defendant's theory of this case.

Plaintiff, in its reply to defendant's cross-complaint, denied the validity of Ordinance number 187 (being the Ordinance under which defendant claimed it should have been charged for electri-

cal current), and contended that it was null and void; and, upon the hearing upon a Motion to Strike made by the plaintiff, the Court ruled Ordinance 187 to be void. With the Trial Court's ruling on this contention, we find ourselves in accord.

The pleadings in this case are quite extensive, and the Record voluminous. Many of the facts in connection with this case appear not to be in dispute. The evidence discloses that the defendant herein was a corporation engaged in manufacturing in the City of Fairfield; that it employed a considerable number of men; that it had used the current produced by the plaintiff city for many years; and had also used city water, furnished by the plaintiff herein, for many years.

The City Clerk of plaintiff city, identified the note involved in this suit, and testified that it bore date of April 23, 1935, and was in the principal sum of \$277.98, payable five months after date, and that said note contained a provision that it was payable at the rate of \$200.00 per month.

Charles W. McCullough, a Director and Treasurer of defendant company, when called as a witness by the plaintiff, identified his signature to the note in question, and admitted having signed said note, "Sexton Manufacturing Company, C. W. McCullough, Treasurer." He testified that at the time the note was given, Mr. Blackburn (who was then Mayor of Fairfield, and whose term was about to expire) came to the office of the defendant and suggested that said company give a note covering its account with the City of Fairfield, and that this note was given as a result of that request. He further testified

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that at that time he had charge of the financing of the defendant company; that he had signed other notes for the defendant company; and that it was his practice to sign notes of the defendant company. He further testified that when Mayor Blackburn came, requesting that this note be signed, that there were no threats made that he recalled.

L. A. Blackburn, testified as a witness for plaintiff, and stated that he was mayor of plaintiff city on the 23th of April, 1935, when the note in question in this suit was executed. He testified that as the end of his term as mayor approached, the defendant company was indebted to the city, and that it was his desire to have all accounts settled, if possible, by the end of his term, and with that in mind he asked the defendant company to make a payment on its account, and that defendant company did make a payment, in part by a check, with the balance by note. This witness further testified that there was no dispute as to the amount defendant company owed and no objection made by defendant company to the giving of a note, and no intimidation used. This witness further testified that there was persuasion used, and that he told defendant company that he didn't want to leave office with "an account like that open." The evidence discloses that this witness was at that time a Director of the defendant company.

This witness further testified that defendant company was charged a 2¢ rate for electricity; that the rate was set during his administration, and it was set at that amount for the reason that a like rate was given to the Campe factory (which was also operating in the City of Fairfield); that said rate was brought about by the fact that the Campe company was closed down and that it was prevailed upon

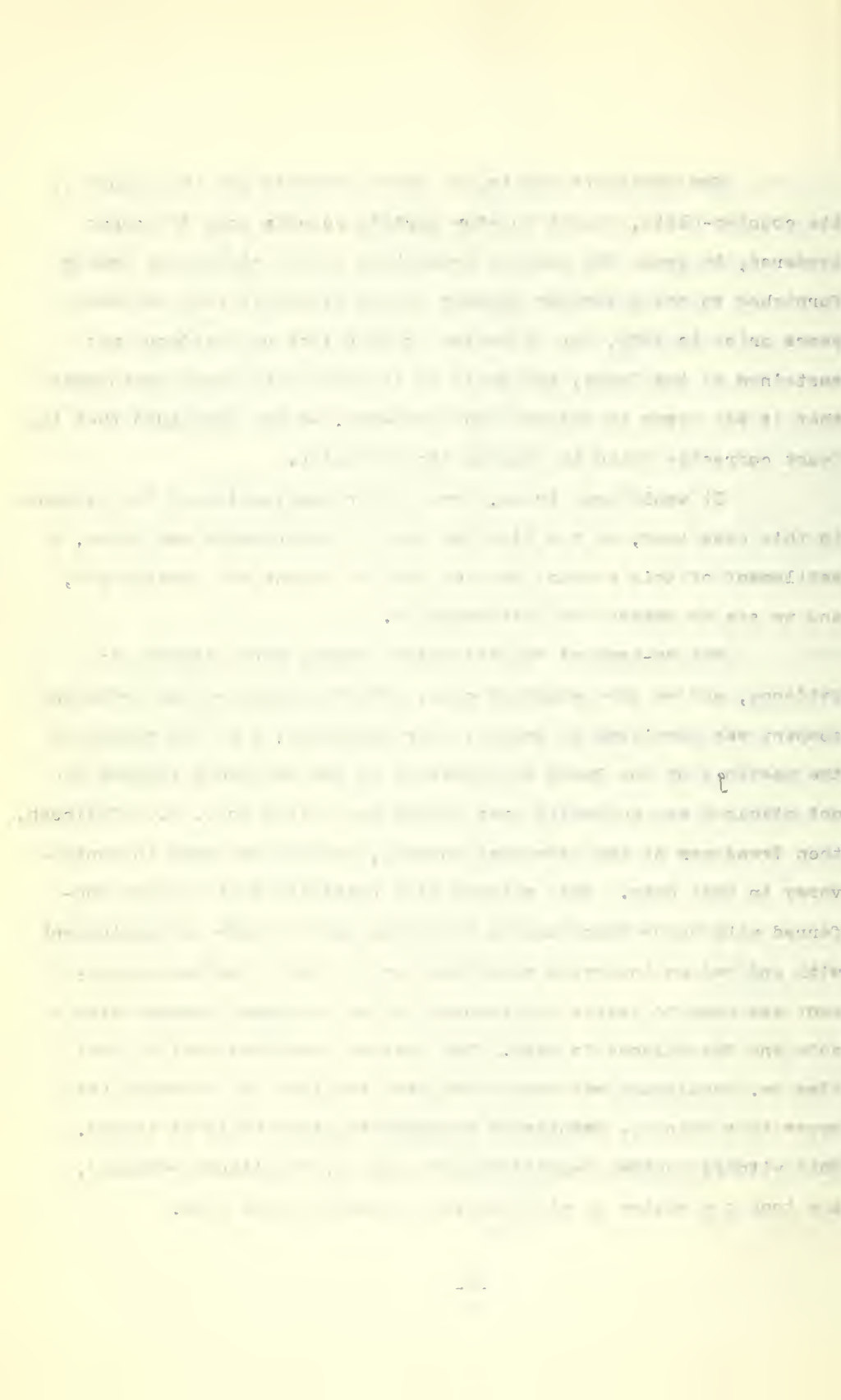
to open by giving it the 2¢ rate. This concession to the Campe Company was made by the mayor and council, without any official record being made thereof, and because they believed it was the best thing for everyone concerned to get the Campe corporation opened for business again; and that since the defendant company was doing the same type of work and employing about the same kind of labor, that they felt it was only fair that the same rate should be extended to defendant company. This rate was then, accordingly, given to defendant company without any request from defendant company, and without the defendant company's knowledge until the bills were sent to it at the lower rate.

The Meter Superintendent, who read and repaired the meters during Mayor Blackburn's administration, from 1931 to 1935, testified that he read the electrical meter of the defendant company, and that after he had read same, he would go to a Mr. Tromley (an employee of defendant company) and give him the meter readings. The evidence then shows that said readings were taken by Mr. Tromley to the city hall and there checked for accuracy. The City Clerk testified that after he had figured the bills, he would take both the light and water bills to the defendant company and check them with Mr. Tromley, and that there never was any dispute as to the amount and there was never any claim made of an overcharge. Mrs. Ruth Stewart, an assistant in the City Clerk's office, testified that she made out part of the bills that were sent to the defendant company and that they were figured for accuracy with an employee of the defendant company, and if any mistakes had been made in the figuring, that they were corrected.

The Defendant herein, by way of defense and in support of its counter-claim, sought to show certain records that defendant tendered, to prove the cost of production of the electrical energy furnished to the defendant company by the plaintiff city for many years prior to 1935, but objection to that line of testimony was sustained by the Court, and while it is urged with great seriousness that it was error to exclude that evidence, we are persuaded that the Court correctly ruled in denying its admission.

It would seem to us, from a fair examination of the evidence in this case that, at the time the note in controversy was given, a settlement of this account was had and the amount due agreed upon, and we see no reason for disturbing it.

The By-Laws of the defendant company were received in evidence, and we have examined same. The Secretary of the defendant company was permitted to answer, over objection, that the record of the meetings of the Board of Directors of the defendant company did not disclose any authority ever having been given to C. W. McCullough, then Treasurer of the defendant company, to sign the note in controversy in this case. This witness also testified that she had conferred with Mayor Blackburn by telephone and had made an appointment with and had an interview with him, and at that time an arrangement was made to settle the account of the defendant company with a note and the balance in cash. She further testified that at that time Mr. McCullough was out of the city and that she informed the mayor that when Mr. McCullough returned the note would be signed. This witness further testified that when Mr. McCullough returned, she took the matter up with him and he executed the note.



It is well established that payment of money will not be held to be paid under duress and may not be recovered unless paid under such pressure as to interfere with the free enjoyment of rights of person or property, and such compulsion must furnish the motive for the payment sought to be avoided or recovered. Proof that one party is under no legal obligation to pay the money and that the other has no right to receive it is of no consequence unless the payment was compulsory, in the sense of depriving the one making it of the exercise of his free will (MILLS v. FOREST PRESERV., 345 Ill. 503).

It has long been a settled principle that a voluntary compromise or settlement of doubtful and conflicting claims will not be set aside or disturbed in the courts. The rule is so familiar as to not require citation of authorities (STOVER v. MITCHELL, 45 Ill. 213).

In order to render a payment compulsory, such a pressure must be brought to bear upon the person paying as to interfere, in some way, with the free enjoyment of his rights or person or property (STOVER v. MITCHELL, Supra; SWANSON v. I JAMES, 63 Ill. 165).

It has been a universally recognized rule that money paid voluntarily under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal. It has been deemed necessary not only to show that the claim asserted was unlawful, but also that the payment was not voluntary; that there was some necessity which amounted to compulsion, and payment was made under the influence of such compulsion (ILLINOIS GLASS CO. v. CHICAGO TELEPHONE CO., 234 Ill. 535).

A great deal of space is taken up in the Record with the testimony of an expert witness, who sought, among other things, to establish the cost of the electrical energy furnished the defendant company over a long period of years, and also establish same for the years 1935 and 1936, and he gave as his opinion the proper rate to be charged the defendant company from December, 1923, to and including July, 1937, was a 1 $\frac{1}{4}$ ¢ rate per kilowatt hour.

It is urged with great insistence in this case that the counter-claim herein should prevail for the reason that the defendant herein was overcharged over a long period of years, and was compelled to pay such overcharges, and that the note herein was secured by duress and extortion, and our attention is further directed to the fact that there was in force an Ordinance of the plaintiff city, by the terms of which a customer whose bill was unpaid and remained unpaid, would have his service disconnected for the non-payment of said bill, and also it is urged that the Mayor of the plaintiff city in securing the note involved in this litigation, was guilty of duress and extortion. We have given careful consideration to all these contentions and we fail to find anything in the Record that in any way indicates the persuasion used by the Mayor of the plaintiff city at the time of procuring the note, was improper in any way. From this record it would seem to us that he was a faithful public servant who was mindful of his obligation to the city he was serving as mayor, and it was his desire to leave the business of the city in good shape at the end of his term of office. We are not impressed with the contention that the provision of the Ordinance for the discontinuing of electrical energy or water service to patrons of the plaintiff city if they did not pay their bills, was a provision that

could in any wise be construed as improper, and if the mayor of plaintiff city used persuasion in bringing about a settlement of the account due from defendant company, that insofar as this Record discloses, the persuasion was well within the bounds of propriety.

★ Duress has been defined as a condition which exists where one induced by an unlawful act of another to make a contract or perform or forego an act under circumstances which deprive him of the exercise of his free will. There must be such compulsion affecting the mind as shows that the execution of the contract or other instrument is not the voluntary act of the maker. Such compulsion must be present and operate at the time the instrument is executed. The burden of proving duress is upon the party charging duress (SHELENSKY v. SHELENSKY, 369 Ill. 179; DECKER v. DECKER, 324 Ill. 457).

Mere annoyance or vexation will not constitute duress, but there must be such compulsion affecting the mind as shows that the execution of the contract or other instrument is not the voluntary act of the maker (HARRIS v. FLACK, 289 Ill. 222; SCHOOL OF ORIENTAL ARTS v. HARDING, 331 Ill. 330).

This Court will not disturb the findings of the Trial Court who heard and saw the witnesses unless such findings are manifestly against the evidence (FLOBERG v. FLOBERG, 358 Ill. 626).

In this case we hold the judgment entered by the Court is not against the manifest weight of the evidence, but amply supported thereby, and said judgment being correct, it is hereby affirmed.

Judgment affirmed.

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AT A TERM OF THE APPELLATE COURT,
Begun and held at Ottawa, on Tuesday, the 6th day of May, in
the year of our Lord one thousand nine hundred and forty-one,
Within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUEFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

311 I.A. 294

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BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of
said Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT.

TO THE DAY TERM, A.D. 1941.

CHARLES WILLIAMS, Administrator of
the Estate of DANIEL W. DAVISON,
Deceased,
Plaintiff-Appellant.

VS.

MARIE A. DAVISON,
Defendant-Appellee,

Appeal from the
Circuit Court of
Woodford County.

WOLFE, -- P. J.

Daniel W. Davison, a resident of the City of Minonk, Woodford County, Illinois, died on June 21, 1934. He left surviving Marie A. Davison, his widow, Harry Webster Davison, a grandson, and Edna Davison Burton, a granddaughter, children of a deceased son.

Marie A. Davison, the widow, is the only party in interest residing in the State of Illinois. She did not petition for Letters of Administration, and Charles Williams, Public Administrator, of Woodford County, was appointed to administer the estate in the year 1937.

A citation to discover assets of the said estate was issued out of the County Court of Woodford County, on the 3d day of July 1939, pursuant to the petition filed by Charles Williams, as

1937, 1938

1939, 1940



1941, 1942

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1943

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Administrator of the Estate of Daniel W. Davison, deceased. Said citation was served on Marie A. Davison. A hearing on the citation was had in the County Court of Woodford County, and the citation was quashed. Charles Williams took an appeal from the said order to the Circuit Court of Woodford County, Illinois. Upon the hearing before the Court, an order was entered directing Marie A. Davison to turn over \$7,000.00 in liberty bonds to the administrator, and to account for the accumulated interest thereon, from June 21, 1934, to the date of settlement. This order was complied with, and the bonds given the administrator. A second order was made requiring Marie A. Davison to turn over to said administrator an additional \$1,000.00 bond, and to account for the interest thereon, from June 21, 1934, to the date of settlement. In compliance with this order, Marie A. Davison assigned a part of her distributive interest in the estate of Daniel W. Davison, deceased, to the administrator.

After these two orders were signed, the Circuit Court of Woodford County, Illinois, entered another order on December 3, 1940, in and by which said Court adjudged and decreed that the said Charles Williams, Administrator as aforesaid, have and recover nothing further from the said Marie A. Davison. It is from this order that Charles Williams, administrator of said estate, has appealed to this Court.

The appellee, in her brief, contends, "The acceptance by the appellant of the assets discovered in full compliance with the turn-over orders was found by the court to be full accord and satisfaction of the issue of discovery and operates as an

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From the preceding history the history of the world is seen to be a history of the human mind.

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and 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

estoppel and may be treated by this court as a release of errors." We agree with the appellee that as a general rule a release of errors is to be pleaded in a Court of Review; however, where the payment of money to plaintiff in error, appellant herein, and its acceptance by him are shown upon the face of the record and attention is called to it by the appellee in his brief and argument, it is as clearly presented to this court as could be done by filing a plea of release of errors. In the present case, however, we do not believe that the acceptance of the bonds and money tendered by Marie A. Davison to the administrator, should bar the appellant from a future recovery. There was not a final disposition of the case, but the Court retained jurisdiction to make further orders.

The appellant contends that the Court erred in not ordering the appellee to turn over additional bonds to the administrator. It is their contention that they have traced several thousand dollars worth of bonds into the possession of the appellee, Marie A. Davison; that after they had traced these bonds to the possession of Marie A. Davison, the burden then shifts to the defendant, and she must explain what has become of the bonds, or turn them over to the administrator. The appellant has cited three cases as sustaining this contention. The first is Hyatt vs. Walker, 44 Ill., at Page 485. This is a case in which some of the heirs of Alexander Hyatt attempted to set aside and vacate several deeds of conveyance which Alexander Hyatt executed and delivered to the other heirs. The contention of the plaintiffs was that Alexander Hyatt was insane at the time he executed the deed. The Court there held that after an

[illegible][illegible]

instrument had been executed, it is binding until the incompetency of the grantor is established, and the proof of that fact, devolves upon the party contesting its binding force.

The next case cited is Hartford Life Ins. Co. v. Gray et al., 80 Ill., Page 28. This case involves the genuineness of a signature to an application for insurance. The Court on page 31, uses this language: "We are of opinion, when the genuineness of a signature to an instrument is established, it affords prima facie evidence that the contents of the instrument were known to the subscriber, and that it is his act, and hence that the burden is upon those who assert the contrary, to make such proof as shall overcome the prima facie evidence."

In Kitner vs. Whitlock, 88 Ill., Page 513, the question is whether a partner is estopped to deny the execution of a note. One of the partners to the suit filed a verified plea that he did not sign the note. The Court held that when the plea of non est factum verified by affidavit is filed, the burden is thrown upon the plaintiff to make such proof as was required at common law to entitle the instrument sued on to be read in evidence, and when that is done, the burden of proof is shifted to the defendant to sustain his plea before the jury. The holding of the Court in these cases does not sustain the contention of the appellant that the burden of proof shifted to the appellee for her to explain what had become of the bonds.

The case was tried before the Court without a jury. The Judge had the opportunity of hearing the witnesses as they testified, and also observing their demeanor and conduct upon

1. The first thing I noticed when I stepped out of the plane was the cold air. It was a sharp contrast to the warm, humid air of the tropics. I had heard that the weather in the north was harsh, but I didn't realize how cold it would be. The wind was biting, and the sun was a pale, distant orb in the sky. I wrapped my coat around myself and shivered. The ground beneath my feet was a mix of dirt and gravel, and the air smelled of dust and exhaust. I took a deep breath and tried to ignore the discomfort. This was my chance to see the world from a different perspective, to experience the raw beauty of the northern landscape. I had come here for a reason, and I was determined to make the most of it. The journey ahead would be long and challenging, but I was ready for whatever came my way. I looked up at the vast, open sky and felt a sense of awe and wonder. The world was so big, and I was so small. But I was here, and I was alive. That was all that mattered.

the witness stand, and from all the facts and circumstances in evidence, decide the merits of the controversy. He has held that the plaintiff failed to trace these bonds, "other than the \$8,000.00," to the possession of Marie A. Davison.

After reading the evidence as abstracted, it is our conclusion that the Court was correct in finding that the appellant had not traced the bonds other than the \$8,000.00 to the possession of Marie A. Davison.

The order appealed from is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

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Abstract

Gen. No. 9639.

Ag. No. 23.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A. D. 1941.

311 I.A. 295

RICHARD L. THORSCH,
vs.
WILHELMINA R. M. HALEY,
Appellant,
Appellee.

}
}
}
Appeal from
Circuit Court,
Will County.

WOLFE, -- P. J.

Richard L. Thorsch filed a suit in the Circuit Court of Will County against Wilhelmina R. M. Haley on six promissory notes. Plaintiff's complaint, alleged that on September 1, 1931, the defendant for a good and valuable consideration made and executed 6 promissory notes, payable to bearer, aggregating the sum of \$1950.00 due semiannually from March 1, 1932, to September 1, 1934, bearing interest at the rate of 6% per annum until maturity and at 7% thereafter; that said notes were also signed by Robert E. Haley, the husband of the defendant; that said Robert E. Haley died February 27, 1935; that the plaintiff was the legal holder and owner of said notes; that there was due thereon the sum

2.

of \$1950.00 as principal, and accrued interest; that the said notes provide for the allowance of attorney's fees, which should be allowed the plaintiff; that the plaintiff made demand upon the defendant for the payment of the principal and accrued interest due upon said notes, but the said notes remain due and unpaid. Plaintiff asks judgment against the defendant in the sum of \$5000.00.

The defendant's answer to the plaintiff's complaint, neither admitted nor denied the making and the execution of said notes, but demanded strict proof of the same; admitted that her husband, Robert E. Haley, died on February 27, 1935; neither admitted nor denied that plaintiff was the legal holder and owner of said notes; neither admitted nor denied that any provision was made for the allowance of attorney's fees; denied that any demand was made on her for the payment of said notes. The answer further alleged, that in the year 1936 in a certain foreclosure suit then pending in the Circuit Court of Will County entitled: "Chicago Title & Trust Company, Trustee v. Wilhelmina R. M. Haley, et al. No. 39233," that after the filing of the bill and answer, at the solicitation of the said plaintiff, defendant agreed to assign the rents and to execute a deed of the property foreclosed upon to the plaintiff for the consideration, that thereafter no judgment of any kind would be entered against said defendant on said mortgage notes or otherwise; that in conformity with such verbal agreement said deed and assignment of rents were executed and delivered to

3.

the plaintiff, and a written stipulation was thereafter entered into and filed in said cause, which was included in the final decree. Paragraph 14 of said decree being as follows:

"The Court further finds that by stipulation of the parties hereto possession of the premises involved herein is to be delivered to the plaintiff and an assignment of rent is to be executed by Wilhelmina R. M. Haley to the Chicago Title & Trust Company as Trustee, and that no personal deficiency decree be entered against the said Wilhelmina R. M. Haley, defendant therein, in case said premises is sold at the Master's Sale for a sum not sufficient to pay the amount found due to the plaintiff in this decree." The decree further provided, "but no personal deficiency judgment or decree be entered against Wilhelmina R. M. Haley in any event."

The answer further alleged that the defendant carried out and performed her said agreement and executed her said deed to said mortgaged property; that all matters of indebtedness of every kind or character were settled, adjudicated, and paid, including this cause of action sued on; that the same was satisfied and paid by the giving of said assignment of rent and said deed by said defendant; that it was thereby in said consent decree stipulated that no judgment was to be thereafter rendered against Wilhelmina R. M. Haley in any event; that said cause of action sued on in this suit was paid and satisfied, and thereby released and discharged of record.

The plaintiff filed a written motion to strike the answer of the defendant as being insufficient in law, and wholly immaterial to the cause of action, as stated in plaintiff's complaint. This motion was overruled by the Court. The plaintiff filed an answer to the

Witness: I, W. J. Kelly, Attorney General of the State of Illinois, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in my files and records.

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affirmative defense set forth in the defendant's answer, and denied that there was any stipulation, or agreement between the plaintiff and the defendant, whereby his notes were agreed to be cancelled and surrendered, and denied that he was a party to the litigation in the suit between the Chicago Title & Trust Company and Wilhelmina R. M. Haley in the foreclosure proceeding, and denied that the indebtedness between the plaintiff and the defendant had been settled, or adjudicated.

The case was tried before the Court without a jury. The issues were found in favor of the defendant, and judgment was entered accordingly. It is from this judgment that the appeal is prosecuted to this Court.

From the pleading and evidence, it will be noted that the defense to this cause of action is, that the agreement in the former foreclosure proceeding provided that both the first and second mortgage notes should be cancelled, and that a decree was entered to that effect. The testimony is in conflict as to what was said and done at the various hearings between the attorneys for the Chicago Title & Trust Company and Mr. Thorsch, the appellant, and with Mrs. Haley and her attorneys. From the evidence, there seems to be no doubt that Mrs. Haley, at the time the settlement was made, thoroughly believed that the second mortgage notes of \$1500.00 were included in the settlement. The appellee's brief is devoted almost entirely to the fraud that the attorneys and Mr. Thorsch perpetrated upon Mrs. Haley by not including these \$1500.00 notes in the final decree in the foreclosure proceeding. The defense of fraud is not

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raised by the pleadings, and is not available to the appellee, as a defense in this proceeding. Fraud is not a conclusion of law, but it is incumbent upon a party charging fraud to state facts in their pleading relied upon as constituting fraud and a general charge that a party acting fraudulently, or was guilty of fraud, is a statement of a conclusion and is not good pleading, unless facts are averred on which the charge is based. (People vs. Board of Appeals 367 Ill. 559.) The answer of the defendant, Wilhelmina R. M. Haley, sets forth facts which she claimed, paid, satisfied, released and discharged the notes. The burden of proving these facts was upon her. Kuhn--Siegrist Hardware Company vs. John Papista 267 Ill. App. 581. An examination of the record discloses that the appellant, Richard L. Thorsch, was not a party to the proceeding in which the first mortgage was foreclosed, therefore the stipulation entered into between the parties in that proceeding does not prevent him from suing on the notes in question.

The judgment of the Trial Court is reversed and the cause remanded.

Reversed and Cause Remanded.

W. H. H.

Abstract

NO. 9640

AGENDA NO. 8

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

311 I.A. 295

February Term, A. D. 1941

IN KOESTER,

Appellee

vs.

GE REBER,

Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
JO DAVIESS COUNTY.

DOVE, J.

Appellee brought suit against appellant before a justice of the peace and recovered a judgment for \$100.00. Upon appeal by appellant to the Circuit Court, a jury was waived and the cause heard by the court resulting in a judgment in favor of appellee, the plaintiff below, for \$73.00 and the defendant brings the record to this court for review.

The evidence disclosed that appellant owned a farm and considerable personal property thereon and in 1938 the parties hereto

ALLIES

TO THE COURT OF
THE DISTRICT OF COLUMBIA

1941 . . . , 1942 y 1943

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Appellate Court said that the trial court's judgment was affirmed. The peace and recovered a judgment for \$100.00. Upon appeal, the defendant to the Circuit Court, the court resulting in a judgment in favor of the plaintiff, for \$100.00 and the defendant's costs. The court for review.

The evidence showed that applicant owned a Ford and

entered into an oral agreement by the provisions of which appellant was to furnish everything except labor and they were to share in the profits or losses on the basis of one-fifth to appellee and four-fifths to appellant. They agreed to take and did take an inventory of all the property when appellee went on the farm and when he left. The values at the time the relation began, which was March 1, 1938, were agreed upon, and when the relation terminated, January 1, 1940, the only dispute was as to the value of certain articles in the inventory. Appellant claimed that according to the values placed *owed appellee \$9.68. Appellee testified that when he left the farm he* on these articles by the parties hereto, he and appellant were unable to agree upon the value of the hay or of a bull and contended that according to the true value of these, appellant owed him \$178.78.

Appellant insisted before the justice of the peace and in the circuit court that the suit was between joint adventurers for an accounting, not within the jurisdiction of a justice of the peace, and that consequently the circuit court was likewise without jurisdiction of the appeal. Want of jurisdiction if the suit was of the character claimed is not disputed.

Questions as to the particular relationship created by a contract to farm on shares are difficult to decide. Much depends upon the terms of the specific contract involved. The general rule is that the question whether the relation of the parties is that of landlord and tenant, landlord and cropper, participants in a common venture, or some other relationship must turn upon the actual intention of the parties as gathered from the entire contract, the language in which it is cast, and the circumstances surrounding its execution. If the import of the agreement is doubtful, the actions of the parties to it may furnish a satisfactory guide for its interpretation. Some courts have said that this class of contracts partakes of the nature

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...on the basis of a right to supplies and labor
...to applicant. They agreed to take and the ...
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of "an adventure" which entitles the person taking the farm to participation in the profits derived therefrom. (15 Am. Jur. Crops, 238, sec. 48.) Babcock v. Katz, 121 Ore. 64, 253 Pac. 373, cited by appellant, is of that class of cases.

The ordinary contract to farm on shares lacks two of the essential elements of a partnership,--namely, that the parties are mutually principals of and agents for each other, and that the business is conducted on a joint account. (15 Am. Jur. supra, sec. 50).

Reported cases are of scant benefit in determining the question whether the parties to a contract sustain the relation of joint adventurers or employer and employee, since in the final analysis the facts of each case must determine the question. An agreement by the owner of an established business, or the promoters of an enterprise to give one employed to render services in connection therewith a share of the net profits in lieu of, or in addition to, a stated salary does not of itself convert the relation of employer and employee into that of joint adventurers; but if the person rendering the service is himself the promoter or an original party to the enterprise, he has usually been held to have an interest therein as joint adventurer with the others, and especially so if he himself contributes capital to the enterprise. (33 C. J. Joint Adventurers, 844, sec. 9.)

In the instant case, appellant was the owner of an established farming business. Appellee was not a promoter thereof and contributed no capital or property thereto. He had no share in any of the property, but merely a share in the profits, if any, derived from the operation of the farm, in consideration of his labor, with a corresponding loss if there were no profits. Appellant was and remained the sole owner of the property and there was no agreement that it was to be divided or sold, or that appellee was to share in the proceeds of the property.

"an advantage" which entitles the party taking the same to participate in the profits derived therefrom. (10 Cal. 2d 709, 358 P.2d 821.) Balcock v. Katz, 181 Cal. 44, 233 P.2d 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

This excludes the case from the definition of a joint adventure.

Appellant's contention that his testimony and the docket entry of the justice of the peace show the suit was for an accounting is equally without merit. The docket entry is that the court finds from the evidence there is due the plaintiff from the defendant the sum of \$100.00 "in an action of assumpsit for money found to be due the Plaintiff from the Defendant on an accounting between Plaintiff and Defendant." Defendant testified in the circuit court that at the time of the hearing before the justice of the peace there was an accounting of profits and losses that was taken down on paper and balanced up, and that the justice did that in arriving at his judgment. Where the relation of the parties is simply that of debtor and creditor, and the amount of the debt is certain or ascertainable by simple calculation, account is not the proper remedy, but the claim should be enforced in the ordinary forms of action according to the nature of the demand, as where assumpsit is the proper remedy; and the mere fact that there are several items on both sides of the account, when by subtracting one side from the other a balance is easily ascertainable, will not drive plaintiff from assumpsit to account. (1 C. J. Accounts and accounting, 604, sec. 13.) The relation between the parties not being a joint adventure, nor a partnership, it resolves itself into that of employer and employee, and the suit was between debtor and creditor. There was no dispute as to the number or quantity of the articles inventoried, or as to losses on certain items. There were no items on both sides of an account within the meaning of that term. The sole issue was as to the value of certain items in the inventory. The so-called accounting was merely a calculation of the amount due appellee. Appellant testified that he and Koester agreed upon the value of the bull at \$45.00 when Koester left the farm. Koester denied this, and his witnesses fixed the value of the

is excluded the case from the definition of a "good" instrument.

Applicant's contention that his testimony and the manner

of the parties in the case show that the instrument is a "good"

equally without merit. The object being to show that the instrument

on the evidence there is no one of the parties who has not

of \$10.00 "in an action of account or money due or to be

to the plaintiff from the defendant on an account between themselves

a defendant." Defendant testified in two circuits that at

the time of the hearing before the Justice of the Peace there was

counting of profits and losses that was taken down on paper and

laid up, and that the Justice had then in writing as the defendant.

are the relation of the parties is that of debtor and creditor,

and the amount of the debt is certain or ascertainable by law.

relation, account is not the proper remedy, and the action should

entered in the ordinary course of action according to the nature

the account, as where account is not proper remedy, and the debt

of that there are several items on the list of the account, and

abstracting one side from the other a balance is easily ascertained.

it, will not define plaintiff's form of account as an account, it is

counts and accounting, 301, 302, 303, 304. The relation between the

ties not being a joint adventure, but a partnership, it is not as

self into that of debtor and creditor, and the bill is drawn

debtor and creditor. There are no doubts as to the nature of the

ty of the parties involved, or as to the nature of the relation.

the same. The sole issue was as to the nature of the relation.

the inventory. The so-called account is not a partnership

the amount due specified. Defendant testified that the account

need upon the value of the bill of \$10.00, possibly less or

Mr. Rooster denied this, and the defendant filed an answer to this

bull at \$75.00 and the hay in the barn at \$10.00 per ton, and in the stack at \$8.00 per ton. Other witnesses fixed the value of the hay at \$7.00 or \$8.00 per ton and appellant testified that the market value of the hay at the time appellee left, was \$6.00 per ton.

In our opinion, the justice of the peace had jurisdiction of the action and the amount found due in the circuit court is sustained by the testimony. The judgment of the circuit court is, therefore, affirmed.

Judgment affirmed.

at \$10.00 and the day in the month of \$10.00 per day, and
the stock at \$10.00 per ton. Other witnesses lived and value in the
at \$10.00 or \$10.00 per ton and reported testified that the value
line of the day at the time of the last, was \$10.00 per ton.
In our opinion, the value of the goods was determined by
a section and the amount found due to the plaintiff is determined
the testimony. The judgment of the court is, therefore,

affirmed.

Testimony affirmed.

Abstract

311 I.A. 296

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1941

M. JANISCO,

Appellee,

v.

FIRST NATIONAL BANK OF LOCK-

Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
WILL COUNTY

DOVE, J.

Appellee recovered a judgment for \$4399.99 in the circuit court of Will County in an action against the First National Bank of Lockport for conversion of five notes, secured by a trust deed alleged to have been deposited with the bank for collection. The suit was instituted on November 10, 1933 and after the issues had been made up, they were submitted to a jury, resulting in a verdict for the plaintiff upon which judgment was rendered, and the bank appeals.

The record discloses that on May 9, 1928, Lida F. Lakin, executed a trust deed for \$11,000.00, on farm land, to Carl H. Muehlenpfordt, trustee, to secure payment of twenty-two notes of \$500.00 each, bearing six per cent interest, payable semi-annually, due in five years. The bank's trust officer testified the loan was not made by the bank and was not carried in its portfolio. Appellee lived on a farm six miles northeast of Lockport. She did her banking business in Lemont. She testified that on a forenoon in May, 1928 she went to appellant bank to make a deposit of \$1,000.00 on interest; that she there met Carl H. Muehlenpfordt, president of the bank and from him purchased two of the notes on Muehlenpfordt's statement that they would bring a larger return and that she could have her money back any time she wanted it. Later in the day she withdrew \$1500.00 from the Lemont bank and purchased three more of the notes. She received her semi-annual interest regularly thereafter until the last payment to her on November 23, 1932.

A stenographer for appellant testified that on April 27, 1931, she prepared and mailed a letter signed by Muehlenpfordt as president of the bank, directed to appellee at Lemont, as follows:

"You are holding trust deed notes of Guy C. Lakin and Lida Lakin, upon which we are demanding payment. Unless these notes are paid we will start foreclosure proceedings and force payment. Kindly bring in your notes and we will give you our receipt until the notes are paid."

Two days afterward, April 29, 1931, appellee left her notes at the bank and received a receipt reading:

"Received from Mrs. M. Janisco Notes No. 12, 13, 16, 17 and 18 signed by Guy C. Lakin and Lida Lakin for collection.

First National Bank, Lockport, Illinois
C. H. Muehlenpfordt,
President."

Appellee testified she never received the letter; that she got her mail on a Lockport rural route through a Lockport mail carrier and had never received any mail out of Lemont; that she came in with the intention of receiving her money, because Mr. Muehlenpfordt had told her she could have it any time, and the reason she came was that she wanted to buy a home; that when she delivered the notes to Muehlenpfordt she asked for her money and was given the receipt; that she went back about a month later and tried to get her money; and that every time she went there for interest she demanded her money; that she always went of her own accord because she wanted to buy a home and wanted to draw the money and that her son Ben Janisco was with her on every occasion when she went to the bank.

Foreclosure had been started on February 18, 1931, by Muehlenpfordt as trustee, and by Leo P. Ward, assistant cashier of the bank, more than two months before the above mentioned letter was mailed. This complaint for foreclosure was sworn to by Ward and alleged that he was the legal holder of all the principal notes and interest coupons secured by the trust deed. The proceeding proceeded to a decree and on June 12, 1931 the mortgaged premises were sold under that decree, for the full amount of the debt, interest and costs, and a master's certificate of sale was duly issued to Muehlenpfordt as purchaser. He committed suicide on April 22, 1933. (Trustees of Schools v. American Surety Co. 307 Ill. App. 398 at Page 401.) Thereafter, on May 15, 1936, in pursuance of a petition previously filed, an order was entered in the foreclosure proceeding, finding that Muehlenpfordt in fact purchased the property on behalf of Matt Janisco, and other named noteholders in certain proportions, the proportion of Matt Janisco being 5/22 thereof and the master was ordered to execute and deliver a

deed to them in the named proportions. Matt Janisco was appellee's husband. He died on March 24, 1939. Appellee was not a party to the foreclosure proceeding or served with process therein and appellee testified that the first time she knew the property was foreclosed was when she received the last interest on November 23, 1932; and that she never gave the bank or any of its officers authority or instructions to foreclose.

On May 13, 1939, Albert Kruger, and other holders of the undivided interest in the property under the master's deed, filed a partition suit, in which appellee and the children of Matt Janisco were made parties defendant. In that suit a decree was entered finding the pendency of the instant suit, and that appellee disclaimed, for herself and the children, any right, title or interest in the real estate, and ordering the proceeds of the 5/22/^{interest}to be deposited with the county treasurer. The premises sold for \$5,800.00 in the partition proceeding. Appellee has never received any part of the principal of her notes or any interest since November 23, 1932.

Ben Janisco, son of appellee, corroborated his mother's testimony in every essential particular. In addition, he testified that on several occasions after the notes were left at the bank appellee demanded her money, and each time Muehlenpfordt would tell her things were pretty tough and she would have to wait. On account of the death of Muehlenpfordt, objections to the testimony of appellee as to her conversations with him were sustained.

A. P. Dailey, president of the bank at the time of the trial, testified that in the usual and customary way of doing business, if the bank received a note for collection, they collected the face value plus interest or returned the note if they were unable to collect it; and that if there were any other instructions the custom of the bank was

and to those in the same position. But I have not yet been able to find out what the result of the investigation was. The fact that the investigation was not a success is not a success in itself. The fact that the investigation was not a success is not a success in itself. The fact that the investigation was not a success is not a success in itself.

[illegible]

to note the instructions on the receipt. He testified on cross-examination that the notes in controversy were left for foreclosure. He further testified he was not present when the receipt was given and the words "for collection" were not explained to him in the presence of appellee. Appellant's counsel promised to connect up the testimony, but did not do so. The testimony shows that after the notes were left at the bank, it paid her the interest regularly until the last payment of interest on November 23, 1932.

The court refused to give an instruction offered by appellants that if the jury believed from a preponderance of the evidence that the letter dated April 27, 1931, was mailed to the plaintiff by the defendant, properly stamped and addressed, it is to be presumed that it was received by the plaintiff unless such presumption is overcome by proof that it was not in fact received by plaintiff, and that her denial of its receipt was not sufficient to overcome the presumption, it must be considered with all the other evidence in the case, and that it was proper for the jury to consider other evidence offered by her that she did in fact deposit the notes on April 29, 1931. The court refused the instruction because it was not offered until the other instructions were being read to the jury. Regardless of the reason assigned by the court, or any other reason, the instruction was based on the assumption that a letter properly addressed and mailed is presumed to have been received. There is no testimony in the record that would justify any assumption that the letter was properly addressed, but on the contrary, the testimony shows without contradiction that it was not properly addressed. The court did not err in refusing to give this instruction.

The claim that the court erred in admitting the testimony of appellee's son as to conversations between her and Muehlenpfordt is equally without merit. There is no testimony to show he had any interest

more and instructions on the subject. We called to know-

lication that the above is correct, with the following:

Further clarified to me and present with the following:

words "for collection" and "for collection" and "for collection"

also, the following: "for collection" and "for collection"

not to be. The following: "for collection" and "for collection"

bank, it paid the interest regularly until the last payment

interest on November 22, 1921.

The court held that the defendant's failure to pay interest

if the jury believed it was a representation of the plaintiff

letter dated April 17, 1921, and failed to pay interest on the

plaintiff's property, and otherwise, it is to be considered that

was received by the plaintiff's agent and payment in advance

proof that it was not a loan received by plaintiff, and that it

of the receipt was not sufficient to establish the plaintiff's

was to be considered with all the other evidence in the case, and that

was proper for the jury to consider other evidence in the case

and did in fact receive the money on April 17, 1921. The court

used the instruction because it was not a loan and the other

instructions were held to be correct. The following: "for collection"

of the court, or any other reason, the instruction was correct

the assumption that a loan was made, and the instruction was

should to have been corrected. There is no error in the instruction

it would be a mistake to say that the instruction was correct, and

in the contrary, the instruction was correct, and the instruction was

not properly stated. The court did not err in the instruction, and

the instruction.

The claim that the court acted in an arbitrary and capricious

manner is not so. The instruction was correct, and the instruction was

and without error. There is no error in the instruction, and the instruction

In the notes or the interest thereon, or that he took any part in the conversations. His testimony as a whole, shows that the expressions: "We did our banking business in Lemont", and "We went to get our interest" were merely colloquial, not intended to convey the idea that he had any interest in the notes or interest thereon. He repeatedly mentioned the transactions as being those of his mother, and her testimony shows the notes and interest belonged exclusively to her.

The claim that the verdict is excessive was not mentioned in the motion for a new trial, which set out the specific grounds relied upon. The argument that the assignment of error that the verdict is excessive should be considered under the ground that "the verdict is not supported by the evidence" mentioned in the motion for new trial is untenable. The ground mentioned in the motion would cover the weight of the evidence, as dependent upon the credibility of the witnesses, or the want of testimony upon a material issue, and has no specific relevancy to excessiveness of the verdict. The design of the statute is to prevent blanket motions and require, as it does, specific grounds, so that the court and opposing counsel may be advised of what is claimed. It is well established that where a party filed a written motion for a new trial, he will be held to waive all causes herefor not set forth in his written motion. (*Lorette v. Director General*, 306 Ill. 348.) The rule is applied to a failure to claim the verdict is excessive. (*Wolfstein v. Illinois Power and Light Corporation*, 34 Ill. App. 362.) The assignment that the verdict is excessive is not properly before us and cannot be considered.

The testimony of appellee and her son shows the notes were left with the bank for collection and not for foreclosure. The jury

For testimony upon the case and information received exclusively from the mentioned the respondents as well as those of his company, he has any interest in the names of interest persons. The respondents were merely collected, and information was given to the respondents. The respondents in January, and the way to the respondents. The respondents as a whole, and the respondents. The respondents on the interest persons, or not on any way to the respondents. The respondents as a whole, and the respondents.

The first of these is the fact that the evidence is not sufficient to establish that the defendant is guilty of the crime charged. The second is the fact that the evidence is not sufficient to establish that the defendant is guilty of the crime charged. The third is the fact that the evidence is not sufficient to establish that the defendant is guilty of the crime charged.

vidently considered the testimony of Dailey, who admitted he was not present when the receipt was given, was of no probative force. The jury were the judges of the facts as to whether the notes were left for collection, and as to whether appellee received the letter of April 7, 1931. Appellee was never informed of the foreclosure which was pending when she left her notes and when the letter purports to have been written, nor until about a year and a half afterward. She was not made a party to the foreclosure, and the bank continued to pay interest to her until November 23, 1932. According to her testimony and that of her son, she was put off from time to time in the collection of the principal. Her son testified that when the receipt for the notes was given his mother by Mr. Muehlenpfordt, in the president's office at the bank, he, Muehlenpfordt, told her: "I can't give you the money now. Things are pretty tough. You will have to wait," but that she could get her interest any time and in the meantime he might get the money, but interest was still payable. He further testified that a few weeks later appellee again demanded her money, and was again put off; and that not long afterward, when she again asked for her money, Muehlenpfordt had the same story and told her: "Things were pretty tough. Can't make it now. Wait awhile. Two weeks or ten days."

The testimony is sufficient to justify a finding of conversion. We find no reversible error in the record and the judgment is, therefore, affirmed.

Judgment affirmed.

...ly considered the question of ... and when the ... of the ... motion, and as to whether ... 1931. Appellee was ... and when she left her ... existed, for until about a year and a half ... a party to the ... her until November 27, 1932. ... and, she was not ... hospital. Her ... to his mother by Dr. ... and are ... her interest ... interest and ... in appellee ... not long ... the same story ... now, this ... The ... and no ...

Abstract

NO. 9670

AGENDA NO. 17

39

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

311 L.A. 297

May Term, A. D. 1941.

CHARLES H. ALBERS, Receiver of
Citizens State Bank of Manteno,

Appellee,

v.

Floyd M. Overby,
Sam T. Shreffler,

Appellee

Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
KANKAKEE COUNTY.

WE, J.

On July 9, 1940 a judgment by confession in favor of appellee against appellant for \$502.77 was rendered in the circuit court of Kankakee County, based on a promissory note theretofore executed to the Citizens State Bank of Manteno by Floyd M. Overby and appellant, Sam T. Shreffler. Thereafter appellant filed his motion to open up this judgment for leave to plead, and from an order denying the same, appellant has perfected this appeal.

Appellant's affidavit in support of his motion recites that the Citizens State Bank of Manteno ceased doing business in December, 1931; that affiant was a customer of the Bank, indebted thereto as principal

on various notes and other obligations, and also as surety for other persons and was liable secondarily by reason of having endorsed automobile and other paper to the bank, in connection with the garage business in which he was at and previous to such time engaged in the village of Manteno; that after the closing of the bank, the receiver obtained judgment against him in the circuit court of Kankakee County upon various obligations due the bank for which affiant was personally responsible, and that he paid the judgment, amounting to several thousand dollars to the receiver of said bank.

The affidavit further sets out that at the time the bank closed, affiant's father and mother, O. C. Shreffler and Minnie A. Shreffler, were also indebted to the bank and other persons, and in order to secure the payment of said indebtedness they executed and delivered to the receiver of said bank a trust deed conveying to him certain farm lands, later lost through foreclosure, and a certain garage property in Manteno which had been tenanted by affiant for several years; that the trust deed secured notes of approximately \$10,000.00, a large part of which were held by the receiver; that later affiant's parents deeded the garage property to affiant subject to the trust deed and to a prior mortgage of \$1,000.00, either of which was assumed by him, and that he later conveyed the garage property to the deputy receiver for the use and benefit of the encumbrance; that the agents of the bank receiver solicited him to re-purchase the garage property for \$8,500.00 and he finally agreed to pay \$7,750.00 for the same, provided he would receive a conveyance of the property, the discharge of the mortgages thereon and the complete satisfaction of all indebtedness of O. C. Shreffler and Minnie A. Shreffler, as well as a satisfaction of the indebtedness of Elwyne O. Shreffler, his brother, who was liable as co-signer on some of their paper to the bank, and a complete release of affiant's remaining liability, contingent or otherwise, to the bank; that on October 2, 1936, the circuit court entered an order in that

...ious notes and other obligations, and ...
...and was liable ...
...and other paper to the bank, in connection with the ...
...to which he was ...
...of ...; that after the closing of the bank, the ...
...judgment against him in the ...
...various obligations ...
...liable, and that he ...
...to the receiver ...

The affidavit ...
...nt's father and mother, ...
...also indebted to the bank and other ...
...payment of said ...
...ver of said bank a ...
...lost through ...
...had been ...
...ed notes of approximately \$10,000.00, a ...
...the receiver; that ...

...liant subject to the ...
...er of which was ...
...ty to the deputy receiver ...
...the agents of the bank ...
...properly for \$1,500.00 and ...
...provided he would ...
...the mortgages ...
...C. ...
...ndeedness of ...

...er on ...
...of ...
...that on October 2, 1936, the ...

ause on the petition of the receiver, which order authorized the deputy receiver to accept his proportionate part of the \$7750.00 in full compromise and satisfaction of the debts of Minnie A., O. C. and Elwyne O. Shreffler to the bank, aggregating \$9931.17, principal and interest, and directing the receiver to convey the garage property to Sam T. Shreffler and to surrender all evidence of indebtedness of appellant, Sam T. Shreffler and of Minnie A. Shreffler, O. C. Shreffler and Elwyne O. Shreffler; that relying upon such order he paid the \$7750.00 and accepted a conveyance of the property, a release of the mortgage and a satisfaction of any and all debts of himself and his father, mother and brother to the bank; that he had been associated with Floyd M. Overby, a friend who was in financial difficulties and who asked affiant to sign his note as an accommodation; that affiant signed the note shortly prior to the closing of the bank; and that Overby is insolvent and is in the penitentiary. The affidavit further states that it was to avoid any contingent or other liability such as this that affiant made it a condition of his negotiations with the deputy receiver that all evidences of indebtedness against him should be surrendered by the receiver on the closing of the deal for the garage property.

Attached to appellant's affidavit are copies of the petition and order therein referred to. The receiver's petition recites the indebtedness of appellant's parents and brother to the bank, the death of O. C. Shreffler, leaving no estate, and the insolvency of Minnie A. and Elwyne O. Shreffler. It sets out the acquiring of the garage property by appellant without assuming any encumbrance thereon, his conveyance to the deputy receiver, and his offer to repurchase it at \$7750.00; that the City National Bank of Manteno was to receive \$1429.17 thereof as holder of the \$1000.00 mortgage; that the petitioner receiver was to receive \$4740.62, "and the City National Bank of Kankakee the

[illegible]

approximate sum of \$1,580.81 for the purpose of reducing the debt of the said Samuel T. Shreffler to them." The petition prays for an order authorizing the acceptance of \$4740.62 in compromise and satisfaction of the debt of Minnie A., Elwyne O. and O. C. Shreffler in the total amount of \$9931.17, and that upon receipt of the same, the receiver be granted permission to cause reconveyance of the premises, "and that he be further granted leave to surrender all evidence of indebtedness now held against Samuel T. Shreffler, Minnie A. Shreffler, Elwyne O. Shreffler and O. C. Shreffler." The order follows the prayer of the petition in *res* verba.

One of the claims of appellee is that under the doctrine of *ejusdem generis* the only evidences of indebtedness which were ordered surrendered were those affecting the title to the property. Appellant's affidavit discloses that he did not assume the obligation of the trust deed or the prior mortgage. It shows he had paid the judgment the receiver had procured against him on obligations for which he was personally responsible. The words "for the purpose of reducing the debt of the said Samuel T. Shreffler to them" in the receiver's petition evidently refer to a debt of appellant to the City National Bank of Waukegan. At the time the order was entered appellant was obligated to the Citizens State Bank of Manteno on the Overby note. So far as the record shows, that was his only obligation to the bank. Appellant's affidavit states that his purpose was to free himself from such obligations as this, and that the trade between him and the deputy receiver was conditioned upon the surrender of all evidence of indebtedness against him on the closing of the deal for the garage property. The contention that the doctrine of *ejusdem generis* applies is without merit.

estimate was of \$1,300.00 for the purpose of obtaining the cost of

the removal of the building to the site. The building was removed

and the replacement of the building was made at the same time.

The cost of the building was \$1,300.00 and the cost of the removal

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Section 11 of the Banking act (Ill. Rev. Stat. 1939, chap. 16 $\frac{1}{2}$, par. 11) provides that upon the order of a court of record of the county where the bank is located, the receiver may sell or compound all bad or doubtful debts, and, on a like order, may sell the real estate and personal property of such bank on such terms as the court shall direct. Appellee attacks that portion of the order of October 2, 1936, which authorized the surrender to appellant of all evidence of his indebtedness to the bank, on the ground that the power of the receiver is derived from the order and not from the statute; that the court has no authority to enter an order authorizing the surrender of assets not specifically described; and that appellant's claim as to his prior agreement with the receiver may be ignored. He also claims that the court can only sell or compound bad or doubtful debts, and that there is no showing that appellant is insolvent or that the Overby note was bad or doubtful. There are several reasons why these contentions are untenable. The authority of the receiver in this particular instance was dependent upon the order of the court, and the court derived its authority from the enabling statute which authorized the order. The order of the court was primarily to authorize the sale of the garage property under the express provision of the statute. The surrender of all evidence of appellant's indebtedness to the bank was incidental thereto as a part of the consideration for the sale of the garage property. The order does not purport to authorize a sale or compounding of the Overby note, or to release Overby from liability thereon. Whether appellant was released without Overby's knowledge is immaterial. If Overby knew of it, that might account for the receiver's retaining possession of the note, but it does not militate against the effectiveness of the order so far as appellant is concerned. Appellant could be released and the debt surrendered as to him without manual delivery of the note. The statute expressly authorizes the receiver to sell the bank's real estate "on such terms as the court shall direct."

[illegible]

the court had jurisdiction of the subject matter and of the terms of the sale. The receiver knew the extent of appellant's obligation to the bank. If there was any error in failing to describe it specifically in the order, such a circumstance does not go to the jurisdiction of the court. The order was not void and is not subject to collateral attack. (Baker v. Brown, 372 Ill. 536.) When the receiver invoked the jurisdiction of the court and procured the ex parte order upon the exact terms prayed for in his petition, the error, if any, was of his own procurement, and he is in no position to question the sufficiency of the order on that account.

Appellant's affidavit in support of his motion makes out a prima facie case for opening the judgment. The order of the circuit court is reversed and the cause is remanded with directions to sustain the motion so far as it asks that the judgment be opened, and for such further proceedings as are not inconsistent with the views herein expressed.

Reversed and remanded with directions.

... court had jurisdiction of the subject matter and of the parties to the
... The receiver knew the extent of appellant's obligations to the
... If there was any error in relation to the receiver's duties,
... the order, such a circumstance does not go to the jurisdiction of the
... The order was not void and is not subject to collateral attack.
... Ver v. Brown, 372 Ill. 535. When the receiver received the funds
... tion of the court and procured the execution of the order upon the funds
... was granted for in his petition, the order, if any, was on his own
... argument, and he is in no position to question the jurisdiction of the
... or on that account.
... Appellant's affidavit is a report of his action and is not a
... in this case for opening the judgment. The order of the circuit
... it is reversed and the cause is remanded with instructions to grant
... motion so far as it asks that the judgment be opened, and for such
... that proceedings as are not inconsistent with the views herein expressed.
... Reversed and remanded with instructions.

Wife

*(3/12/41
adv. 21.3)*

GEN. NO. 9528

AGENDA NO. 36

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, 1941.

MAURICE DARNER, Administrator
of the estate of Dessie E.
Darner, deceased, and
EDNA DARNER,

APPELLEES.

vs.

: APPEAL FROM CIRCUIT COURT
OF DuPAGE COUNTY.

NATE COLBY and JOHNSON OIL
REFINING COMPANY, a Corporation,
(Johnson Oil Refining Company,
a corporation,

APPELLANT).

311 I.A. 352

HUFFMAN, J.

Appellee administrator brought suit against Nate Colby and the Johnson Oil Refining Company, a Corporation, for the alleged wrongful death of Dessie E. Darner, resulting from a collision of an automobile in which she was riding with a truck then being operated by Nate Colby. Counterclaim was filed against appellee administrator and Edna Darner, driver of the car in which the deceased was riding. Edna Darner filed her counterclaim against Colby and appellant company. Trial resulted in verdicts for appellees against both of the defendants below. Judgments were rendered upon the verdicts. The appellant, Johnson Oil Refining Company, prosecuted its appeal from such judgments, which was before this court at its February Term, 1940.

Appellant argued two points for reversal. The first being, that Colby was an independent contractor, and the relationship of master and servant did not exist between him and appellant under their contract. The second point urged, charged that Edna Darner was guilty of such contributory negligence as to bar recovery.

In support of the first point, appellant relied largely on the case of Jones v. Standerfer, 296 Ill. App. 145. Because of the similarity of the contract between appellant and Colby, and that involved in Jones v. Standerfer, supra, this court held that the contract between appellant and Colby did not give rise to the relationship of master and servant, and reversed the judgments as to the appellant, Johnson Oil Refining Company. (Darner v. Colby, 305 Ill. App. 163, Abst.). On leave to appeal being granted by the Supreme Court, the contract was held to create the relationship of master and servant. Darner v. Colby, 375 Ill. 558.

The cause is now again before this court by virtue of the mandate of the Supreme Court, with directions to consider any other errors raised by appellant, than the one referred to in our former opinion.

Because of the construction given to the contract by this court upon its previous consideration of the case, it was unnecessary to refer to the second point urged, so far as the appellant, Johnson Oil Refining Company, was concerned, and Colby prosecuted no appeal.

The first point urged by appellant for reversal is now eliminated from further consideration. Only the second point remains. Appellant, in this respect, charges that Edna Darner was the agent and servant of plaintiff's intestate at the time

Appellant argues two points for reversal. The first would
that this was an independent contractor, not the relationship
of master and servant and that the contract was not a contract
under their contract. The second point would, charged that
some lawyer was guilty of an independent contractor and that
the contract was not a contract.

In answer of the first point, appellant relied on the
on the case of Jones v. Jones, 225 Ill. App. 1st, 193. As an
of the similarity of the contract between appellant and Jones,
and that involved is Jones v. Jones, 225 Ill. App. 1st, 193.
held that the contract between appellant and Jones was not a
rise to the relationship of master and servant, and reversed.
the judgments as to the appellant, Jones v. Jones, 225 Ill. App. 1st, 193.
Thermer v. Jones, 225 Ill. App. 1st, 193. As to the second point,
being created by the Supreme Court, the contract was held to
create the relationship of master and servant. Jones v. Jones,
225 Ill. App. 1st, 193.

The same is now again before this court in Jones v. Jones.
mandate of the Supreme Court, the question is whether any
other facts raised by appellant, from the contract as to
our former decision.

Because of the position of the contract as to the contract as to
court upon the previous decision of the court, it was not
necessary to refer to the second point of the contract as to
appellant, Jones v. Jones, 225 Ill. App. 1st, 193.
Jones v. Jones, 225 Ill. App. 1st, 193.

The first point would be reversed for reversal in Jones
eliminated from further consideration, and the second point
remains. Appellant, in this contract, charged that some
and the second point of appellant's decision as to the

in question, and was guilty of such contributory negligence as to bar recovery.

Where the relationship of master and servant is found to exist, the action results in a question of fact whether the servant was guilty of the negligence bringing about the injuries complained of, and whether those claiming for such injuries were guilty of negligence which contributed thereto. These questions were before the jury upon the trial of the case. Both were decided adversely to appellant's contention.

Under the rule applicable herein, the master is identified with the servant, and the negligence of the servant becomes the negligence of the master.

After a review of the facts upon the questions now under consideration, we are not disposed to disturb the verdicts.

The judgments are therefore affirmed.

Judgments affirmed.

in question, and was guilty of such conduct as to render him liable as to her recovery.

There the relationship of master and servant is shown to exist, the action is in a question of fact, and the servant was guilty of the negligence which caused the injuries complained of, and without some other, by which injuries were guilty of negligence which constituted them. These questions were before the jury upon the trial of the case, and were decided adversely to appellant's contention. Under the rule applicable hereto, the master is identified with the servant, and the negligence of the servant becomes the negligence of the master.

After a review of the facts upon the questions now under consideration, we are not disposed to disturb the verdict. The judgment is therefore affirmed.

Judgment affirmed.

0/19,
Wolf
Save for future

GEN. NO. 9666

AGENDA NO. 15

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, 1941.

LUCIE GRISE PALARDIS,
APPELLANT,

vs.

EBEN B. GOWER,
APPELLEE.

:

APPEAL FROM THE CIRCUIT

COURT OF KANKAKEE COUNTY.

311 I.A. 352²

HUFFMAN, J.

This was an action in assumpsit filed in the Circuit Court of Kankakee county, by appellant against appellee. The cause was heard by the court without jury, and judgment rendered for appellee. The plaintiff below brings this appeal.

It appears that M. H. Adams and Grace, his wife, owned a house and lot in the city of Kankakee, in which they resided. This property was subject to a first mortgage in the sum of \$3500. It appears that the sisters of appellant advanced money for a second loan on the Adam's property in the sum of \$1450, which was evidenced by two notes of \$650, and \$800, given to secure a trust deed to C. A. Mueller, as trustee. The date of the junior mortgage was April 17, 1925. Appellant came into the ownership of one of the notes by inheritance from her sister, Philomene, and of the other note by assignment from her other sister.

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The course was held at the University of the Pacific, Stockton, California.

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Appellee became attorney for appellant. While acting as such, he executed the following instrument:

"I hereby acknowledge receipt from Lucie Grise, individually and as administratrix with the will annexed of the estate of Philomene Grise, deceased, the following notes and deeds of trust given to secure the payment of the same:

M. H. Adams and Grace Adams, \$650.00, dated April 17, 1925.

M. H. Adams and Grace Adams, \$800.00, dated April 17, 1925.

Interest paid to November 17, 1926, 7%.

Note of Margaret Williams, \$1000.00 dated May 13, 1926.

Note of Charles Hack, \$1000.00, dated April 27, 1926.

I hereby undertake and agree that said notes, two of which are now involved in the foreclosure of the trust deed given to secure the same, will be paid in due course.

I hereby, for good and valuable consideration, guarantee the payment of each of said notes and agree that the same will be collected by me or by my heirs and representatives without charge against said Lucie Grise.

Sept. 24th, 1927.

Eben B. Gower."

The William's note and the Hack note mentioned in the above instrument were paid, and appellant received the proceeds therefrom.

Appellant in this suit, seeks to recover from appellee upon the two notes given by Adams and wife, and secured by the junior trust deed, by virtue of the above instrument.

It appears that Adams was indebted to appellee for legal services, and that on Jan. 18, 1926, he took a deed from Adams and wife for the premises in question, subject to the liens of the two prior mortgages. He claims that soon thereafter, he advised appellant of this fact and explained to her that before he could realize anything by way of compensation for services rendered to Adams, the property would have to sell for more than enough to pay the two prior mortgages. He claims that he asked appellant if she would take the deed, and she

replied for him to take it. Subsequent to appellee taking such deed, appellant sued Adams for possession of the premises by virtue of the conveyance to appellee. Adams defended the suit on the ground that the deed was given in the nature of a mortgage. Appeal was taken from the decision of the trial court in that case. Appellee states he then advised her that the best way to proceed was by foreclosure suit, and that it would be necessary for her to secure another lawyer to bring the suit, as he would be a necessary party thereto. He states she authorized him to secure the services of V. A. Parish to bring such foreclosure; that the same was brought, and appellee was made a party thereto; that it never came to trial because Adams surrendered possession of the premises, and the suit which was pending with respect to the right of possession was abandoned.

Appellee further testifies that the property at this time was in a bad state of repair, and that he offered to give deed therefor to appellant, but that she did not desire same, and said for him to carry it until the property was sold. Appellee states that he expended money on the property to put it in shape for renting; that he had collected the rents and paid the interest and the taxes; that he was ready and willing, and at all times had been ready and willing, to convey the property to appellant; that he considered the value of the premises in 1927, to be from six to seven thousand dollars. He denies that any consideration passed for the giving of the above instrument to appellant under date of September 24, 1926. He claims he received nothing of value therefor, and that appellant surrendered nothing of value by virtue thereof. He says that before taking the deed from Adams, he talked the matter over with appellant; that he was convinced a foreclosure

proceeding would be necessary, and considered that the property had sufficient value to pay the two prior mortgage liens, and leave a balance to apply upon the indebtedness from Adams to him.

The appellant was a woman over seventy years of age, and had worked in the family of appellee as a domestic for about twelve years. She did not possess much education, and could read but little English. There is no question but that she placed implicit confidence in the judgment and integrity of appellee. It appears that the loan to Adams, as represented by the two notes in question, was made by the two sisters of appellant. She denies that she knew the Adams' property had been conveyed to appellee, or that he had ever offered to deed the same to her. She claims that appellee led her to believe that the loan was good and the money was safe, and that it would be paid. We do not find in her testimony where she claims that any consideration passed for the giving of the instrument in question.

Appellant urges that the instrument reciting, a good and valuable consideration, thereby imports same. Such only establishes a prima facie case. Appellee, by his answer, denied any consideration for the instrument, and the court heard evidence upon this point. ✓

Situations such as exist herein, are indeed regrettable. Appellee states that appellant was importuning him to collect the money for her that was due upon the second mortgage notes; that he tried to quiet her fears by stating that he thought she need have no worry; that the property was worth the amount of indebtedness against it, and that she would receive her money. His explanation for giving her the paper was to passify her. Be this as it may, it has resulted in a sharp misunder-

proceeding would be necessary, and consequently that the government
not sufficient value to pay the tax and hence the time, and
leave a balance in favor of the government from which to
him.

The appellant was a woman over thirty years of age, and
had worked in the family of the appellee as a domestic for several
twelve years. She did not receive any education, and could
read but little English. There is no question that she was
placed in the household of the appellee as a domestic, and that she
applied. It appears that the room in which she was employed
by the two noted in question, was one of the two rooms of the
apartment. The parties find that the appellee employed two
been employed to appellee, or that he was employed in such
the same to her. The parties find that appellee was not in control
that the loan was good and the money was paid and that it
would be paid. It is not found in the testimony that the appellee
that any consideration passed for the giving of the money
in question.

Appellant argues that the appellee, having a loan, and
valuable consideration, having made same, that she
establishes a prima facie case. Appellant, by this argument,
denies any consideration for the money, and the appellee
bears the burden of proof.

Appellant also argues that the appellee, and the appellee's
Appellant states that appellee was employed in the household
The money for her that she was upon the appellee's property
that he tried to make her believe by telling her that he was
she need have no worry that the money was hers, and would
of indebtedness against her, and that she would have to pay
money. The appellee, however, has shown that she was in control
not, as this is in fact, it is not possible to find that the

standing between the parties.

Under the instrument sued on, we do not find wherein appellant abandoned any legal rights she had by virtue of the notes secured by the second trust deed, or where the appellee secured any benefit or advantage. While the motive given by appellee for executing the instrument is somewhat unusual, yet a motive for a promise will not supply the necessary element of consideration. *Meixner v. Western Livestock Ins. Co.*, 203 Ill. App. 523.

This is an action at law, based upon an instrument for the giving of which the court found no consideration existed. The trial court heard the testimony, and we are not disposed to disturb the judgment. The judgment is therefore affirmed.

Judgment affirmed.

Alone. J. dissents.

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Under the instrument and out of the net sum which appellant abandoned any legal interest and the net sum of which the notes secured by the second trust deed, on which the appellee secured any benefit or advantage. This is a matter given by appellee for executing the instrument as a matter of law, yet a matter which is not within the necessary element of consideration. *Waller v. Waller*, 100 Ark. 111, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943

This is an action at law, based upon an obligation to pay, the giving of which the Court found to be established. The trial court heard the testimony, and we are not disposed to disturb the judgment. The judgment is affirmed.

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Massachusetts of 1840

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, 1941.

311 I.A. 353'

ROLLIN VOLKERS and MERNICE
VOLKERS, a Minor by ROLLIN
VOLKERS, his next friend,

APPELLEES,

vs.

CHARLES H. VOLKERS, ET AL.,

APPELLANTS.

: APPEAL FROM THE CIRCUIT
COURT OF STEPHENSON COUNTY.

HUFFMAN, J.

Appellees brought suit in the Circuit Court of Stephenson county for the partition of certain lands of Alma Volkens, deceased. They also asked for an accounting as between them and two of the defendants. However, this matter was settled, and did not go to hearing. Appellants filed their motion to dismiss the complaint for certain alleged insufficiencies. Appellees filed an amended complaint. Appellants made answer to the amended complaint, which raised no controversy as to the interests of the respective parties in the land sought to be partitioned. They made no further appearance in the matter until after decree and sale, when they objected to an attorney fee for plaintiffs' solicitor. The master overruled appellees' objections to the allowance of such fee. Exceptions to the master's report were denied by the trial court, and the rights of the parties fixed and solicitor's

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

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fee granted as found and recommended by the master. Appellants bring this appeal from such decree with respect only to the allowance of solicitor's fee.

The original complaint as drawn was far from perfect, but we find that the heirship of Alma Volkers, as set out therein, is the same as set out in the decree of the court. Therefore, it would appear that aside from the many defects and other uncertainties of the complaint, it did set out the parties in interest together with their relationship to the deceased. It further appears that the complaint as originally filed, includes the lands which are made the subject of partition by the court's decree. However, it did include real estate not situated in Illinois. This land was omitted from the amended complaint. It is not to be presumed that the trial court would have granted partition to such land.

Appellants cite many authorities, as well as the statute bearing upon this question. There is no dispute as to the rules applicable in proceedings of this character. Whenever it becomes necessary for defendants to a partition suit to employ counsel and defend the suit in good faith in order to protect their rights or interests in the subject matter, then a decree apportioning the plaintiffs' costs and solicitor fee should not be granted. But here, it does not appear that the solicitor for the plaintiffs was attempting to act in any manner adverse to the interest of the appellants. The fact appellants made no appearance in the matter at the time of taking evidence would indicate that no good or substantial defense existed as to appellees' right to partition, or that appellants' interests were not properly set out along with the other heirship of Alma Volkers. Frequently, the personal

1. The first step in the process of identifying a problem is to determine the nature of the problem. This involves a thorough understanding of the situation and the factors that are contributing to the problem. Once the nature of the problem is understood, the next step is to identify the causes of the problem. This involves a detailed analysis of the situation and the factors that are contributing to the problem. Once the causes of the problem are identified, the next step is to develop a plan of action. This involves determining the steps that need to be taken to solve the problem and the resources that will be required to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan of action. Finally, the last step in the process is to evaluate the results of the plan. This involves determining whether the plan has been successful in solving the problem and whether any further action is required.

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The original recording is being made for the FBI.

10-11-1941

There is no record of any other persons, named, who were present at the same time and place.

There is no one who is not a member of the Church of Christ.

† The presence of a talisman and its possession were made known

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

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...over fifteen years.

relations between parties in actions of this character, are not friendly, nor the proceedings amicable. However, such a situation does not justify the court in assuming that plaintiffs, or their solicitor, are not fairly and honestly representing the interest of all the parties beneficially interested in the premises sought to be partitioned. We do not find wherein the heirship, or the lands which are made the subject of the decree herein, were not made to appear in the original complaint in the manner as set out by the decree, even though the original complaint was haphazard and poorly drawn.

The decree is therefore affirmed.

Decree affirmed.

Done, J. Dissent

relationship between parties is subject of this document, and
 not liability, nor the propriety of a settlement. However, the
 a statement does not deny the fact that the parties are
 plaintiffs, or their solicitors, and not liable for damages
 representing the interest of all the parties involved
 interested in the purchase of the property, and on
 and find therein the liability of the parties and the
 the subject of the contract, and the same is subject
 in the original contract in the matter as set out, and
 hence, even though the original contract was not
 and hereby drawn.

The decree is hereby affirmed.

Wm. H. Smith

Wm. H. Smith, J. 1900

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, 1941.

311 I.A. 353²

NINA O. ROBERTSON,

APPELLANT,

vs.

APPEAL FROM THE CIRCUIT

FARMERS STATE BANK OF
DANFORTH, a Corporation,
and WILLIS M. ROBERTSON,

APPELLEES.

COURT OF SROQUOIS COUNTY.

HUFFMAN, J.

This was an action at law by appellant, Nina O. Robertson, against the Farmers State Bank of Danforth, to recover the sum of \$1421.55, representing the balance of a deposit of \$1521.55 made by her in said bank. Her account was credited with said deposit and the same entered in her pass book. Thereafter, she drew a check in favor of William Classen for \$100, which was presented and paid, thus leaving her balance standing at \$1421.55.

The deposit originated by way of draft which had issued to appellant and her husband, Willis M. Robertson, in payment for the purchase of real estate owned by them as joint tenants.

Shortly after appellant deposited this money, the cashier of the bank permitted her husband to draw out the balance of \$1421.55 upon checks signed by him. Appellant thereafter

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

NOTES

1971-1972 1973-1974 1975-1976 1977-1978 1979-1980 1981-1982 1983-1984 1985-1986 1987-1988 1989-1990 1991-1992 1993-1994 1995-1996 1997-1998 1999-2000 2001-2002 2003-2004 2005-2006 2007-2008 2009-2010 2011-2012 2013-2014 2015-2016 2017-2018 2019-2020 2021-2022 2023-2024 2025-2026 2027-2028 2029-2030 2031-2032 2033-2034 2035-2036 2037-2038 2039-2040 2041-2042 2043-2044 2045-2046 2047-2048 2049-2050 2051-2052 2053-2054 2055-2056 2057-2058 2059-2060 2061-2062 2063-2064 2065-2066 2067-2068 2069-2070 2071-2072 2073-2074 2075-2076 2077-2078 2079-2080 2081-2082 2083-2084 2085-2086 2087-2088 2089-2090 2091-2092 2093-2094 2095-2096 2097-2098 2099-2100 2101-2102 2103-2104 2105-2106 2107-2108 2109-2110 2111-2112 2113-2114 2115-2116 2117-2118 2119-2120 2121-2122 2123-2124 2125-2126 2127-2128 2129-2130 2131-2132 2133-2134 2135-2136 2137-2138 2139-2140 2141-2142 2143-2144 2145-2146 2147-2148 2149-2150 2151-2152 2153-2154 2155-2156 2157-2158 2159-2160 2161-2162 2163-2164 2165-2166 2167-2168 2169-2170 2171-2172 2173-2174 2175-2176 2177-2178 2179-2180 2181-2182 2183-2184 2185-2186 2187-2188 2189-2190 2191-2192 2193-2194 2195-2196 2197-2198 2199-2200 2201-2202 2203-2204 2205-2206 2207-2208 2209-2210 2211-2212 2213-2214 2215-2216 2217-2218 2219-2220 2221-2222 2223-2224 2225-2226 2227-2228 2229-2230 2231-2232 2233-2234 2235-2236 2237-2238 2239-2240 2241-2242 2243-2244 2245-2246 2247-2248 2249-2250 2251-2252 2253-2254 2255-2256 2257-2258 2259-2260 2261-2262 2263-2264 2265-2266 2267-2268 2269-2270 2271-2272 2273-2274 2275-2276 2277-2278 2279-2280 2281-2282 2283-2284 2285-2286 2287-2288 2289-2290 2291-2292 2293-2294 2295-2296 2297-2298 2299-2300 2301-2302 2303-2304 2305-2306 2307-2308 2309-2310 2311-2312 2313-2314 2315-2316 2317-2318 2319-2320 2321-2322 2323-2324 2325-2326 2327-2328 2329-2330 2331-2332 2333-2334 2335-2336 2337-2338 2339-2340 2341-2342 2343-2344 2345-2346 2347-2348 2349-2350 2351-2352 2353-2354 2355-2356 2357-2358 2359-2360 2361-2362 2363-2364 2365-2366 2367-2368 2369-2370 2371-2372 2373-2374 2375-2376 2377-2378 2379-2380 2381-2382 2383-2384 2385-2386 2387-2388 2389-2390 2391-2392 2393-2394 2395-2396 2397-2398 2399-2400 2401-2402 2403-2404 2405-2406 2407-2408 2409-2410 2411-2412 2413-2414 2415-2416 2417-2418 2419-2420 2421-2422 2423-2424 2425-2426 2427-2428 2429-2430 2431-2432 2433-2434 2435-2436 2437-2438 2439-2440 2441-2442 2443-2444 2445-2446 2447-2448 2449-2450 2451-2452 2453-2454 2455-2456 2457-2458 2459-2460 2461-2462 2463-2464 2465-2466 2467-2468 2469-2470 2471-2472 2473-2474 2475-2476 2477-2478 2479-2480 2481-2482 2483-2484 2485-2486 2487-2488 2489-2490 2491-2492 2493-2494 2495-2496 2497-2498 2499-2500 2501-2502 2503-2504 2505-2506 2507-2508 2509-2510 2511-2512 2513-2514 2515-2516 2517-2518 2519-2520 2521-2522 2523-2524 2525-2526 2527-2528 2529-2530 2531-2532 2533-2534 2535-2536 2537-2538 2539-2540 2541-2542 2543-2544 2545-2546 2547-2548 2549-2550 2551-2552 2553-2554 2555-2556 2557-2558 2559-2560 2561-2562 2563-2564 2565-2566 2567-2568 2569-2570 2571-2572 2573-2574 2575-2576 2577-2578 2579-2580 2581-2582 2583-2584 2585-2586 2587-2588 2589-2590 2591-2592 2593-2594 2595-2596 2597-2598 2599-2600 2601-2602 2603-2604 2605-2606 2607-2608 2609-2610 2611-2612 2613-2614 2615-2616 2617-2618 2619-2620 2621-2622 2623-2624 2625-2626 2627-2628 2629-2630 2631-2632 2633-2634 2635-2636 2637-2638 2639-2640 2641-2642 2643-2644 2645-2646 2647-2648 2649-2650 2651-2652 2653-2654 2655-2656 2657-2658 2659-2660 2661-2662 2663-2664 2665-2666 2667-2668 2669-2670 2671-2672 2673-2674 2675-2676 2677-2678 2679-2680 2681-2682 2683-2684 2685-2686 2687-2688 2689-2690 2691-2692 2693-2694 2695-2696 2697-2698 2699-2700 2701-2702 2703-2704 2705-2706 2707-2708 2709-2710 2711-2712 2713-2714 2715-2716 2717-2718 2719-2720 2721-2722 2723-2724 2725-2726 2727-2728 2729-2730 2731-2732 2733-2734 2735-2736 2737-2738 2739-2740 2741-2742 2743-2744 2745-2746 2747-2748 2749-2750 2751-2752 2753-2754 2755-2756 2757-2758 2759-2760 2761-2762 2763-2764 2765-2766 2767-2768 2769-2770 2771-2772 2773-2774 2775-2776 2777-2778 2779-2780 2781-2782 2783-2784 2785-2786 2787-2788 2789

1992, 73-103.

brought this suit against the bank to recover said amount.

Over the objections of appellant, the husband was permitted to file an intervening petition, wherein he set up that his wife conducted a coal business in the village of Gilman, and that by the operation of such business, she had become indebted to him. He further claimed to be the owner of an undivided one-half interest in the fund so deposited by her. He also set up in his intervening petition that certain marital differences had arisen between him and his wife which had caused their separation, and that in consequence thereof, they had entered into a settlement of all their property rights, and that by the terms of such settlement agreement, the money which she had so deposited, was to be the sole property of said intervener, and he asserted claim to the ownership thereof.

The jury returned verdicts in favor of the bank and the husband. Judgments were rendered thereon, from which appellant has prosecuted this appeal.

The testimony of the husband, as intervener, with reference to the matters in issue is very brief. He states that the deposit arose from the sale of real estate of which he and the appellant were joint owners; that he was liable on certain obligations growing out of his wife's operation of a coal company in Gilman; that he used a portion of the money to discharge obligations of the coal company upon which he was liable; and that he had released all claims against the coal company. His evidence is barren of anything tending to prove his right to withdraw from the bank the personal deposit of his wife. He was the only witness in his behalf.

Appellant claims that the coal business belonged to the husband, and she merely ran it while he gave his time to his

brought this suit against the bank to recover the money.

For the objection of negligence, the witness was not

admitted to give an independent opinion, because he was not

that his wife committed a moral offense in the matter of

illness, and that by the operation of said illness, and the

became indebted to him. He further stated that he was

of an undivided one-half interest in the bank as represented by

her. He also says in his testimony that he was not

marital differences had arisen between him and his wife which

had caused their separation, and that he was not

they had entered into a settlement of all their mutual claims,

and that of the terms of such settlement, but money

which she had so deposited, was not to be paid to him,

inter vivos, and he asserted that to the contrary.

The jury returned verdicts in favor of the bank and the

husband. Judgment was rendered thereon, with costs against

and was pronounced this appeal.

The testimony of the husband, as given, was that

ence to the witness in issue is very small. He stated that

the deposit was for the sake of real estate in the name of

and the appeal was "discontinued" and he was granted an

certain obligations, leaving out of his wife's name and

coal company in Illinois, and he was a partner in the same

discharge of the same, and he was a partner in the same

Illinois; and that he was a partner in the same

company. He advised in regard to the Illinois

his right to withdraw from the same, and he was

his wife. He was the only witness in the case.

Appellant offered and the court refused to admit

husband, and the appeal was dismissed with costs.

profession as a veterinarian. She states that her husband gave her the draft to deposit as her own. In this, she is corroborated by the son of appellant and the intervener, as well as two other witnesses, who testified that the husband said the money from the sale of the property belonged to Mrs. Robertson. The wife denied that she authorized the bank to permit any third person to draw against her account. The testimony of the cashier of the bank discloses that the husband and wife had borrowed \$700. from that institution; that at the time the husband drew out the deposit in question, \$305, remained due on their note, and that the husband paid such balance due by way of check drawn against appellant's account. The cashier of the bank offers no explanation as to why the husband was permitted to withdraw appellant's deposit.

When appellant deposited the money and her account was credited therewith, the relationship of debtor and creditor arose between her and the bank. The separation agreement, which was later entered into between the husband and wife, had to do with the severance of the marital relationship, and the support money to be paid by the husband to the wife. We find nothing therein referring to the deposit in question or the money from the sale of the said property.

Appellant filed her motion to strike the intervening petition of the husband, on the grounds that he failed therein to show a direct interest in the subject matter of the litigation; that the matters he sought to inject into the case were entirely foreign to those involved between appellant and the bank, and grew out of matrimonial difficulties between them, and were based upon their own personal transactions entirely

outside the issues involved in the suit between her and the bank; and that under the pretext of filing an intervening petition, he should not be allowed to bring such matters into this case. The action of the court in overruling her motion to strike the intervening petition is assigned as error.

The intervener urges that he had such an interest in the subject matter of the litigation as to entitle him to the right to intervene. In this respect, citing the case of *Bachelor v. Dockerman*, 291 Ill. App. 418. And further insisting that the right to intervene exists at law as well as in equity, citing in this respect, the case of *Crewing v. American Baking Company*, 293 Ill. App. 604. We do not consider either of the above cases controlling herein. The first case referred to was an equity matter in which the intervener was claiming a vendor's lien to the property which was the subject matter of the litigation. The second case referred to had to do with the bringing in of new parties defendant, and was not considering the right of a person to intervene. This situation is illustrated in the case of *Hairgrove v. City of Jacksonville*, 366 Ill. 163, 183, et seq.

The right to intervene is not an absolute right, and where such intervention will result in injecting into a suit issues foreign thereto, and which only serve to complicate the case, intervention may be denied. *Hairgrove v. City of Jacksonville*, supra, p. 184. We are of the opinion that the intervener had no place in this suit. ✓

In case the bank paid the money to the rightful party, that was a matter of defense for the bank. Such a situation as existed in this case between the bank and appellant, would not warrant a third party coming into the case as an intervener

Under the terms of the contract, the defendant was to provide the plaintiff with a certain number of shares of the plaintiff's stock. The defendant failed to do so, and the plaintiff brought this action to recover the value of the shares. The court found in favor of the plaintiff and awarded damages.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or whether it is merely a propaganda organization.

to establish his right to the money. The question involved was between appellant and the bank with respect to whether the bank had wrongfully paid out her money.

The judgment is therefore reversed and the cause remanded with directions to grant the motion of appellant to strike the intervening petition, and for a new trial.

Reversed and remanded with directions.

to establish his right to the money. The matter was between appellant and the bank with respect to whether the bank had wrongfully paid out her money. The judgment is therefore reversed and the cause remanded with directions to grant the motion of appellant to remove the intervening petition, and for a new trial. Reversed and remanded with instructions.

40834

12A
JOHN B. MAYPOLE and
MAYME E. MAYPOLE,
Appellants,

v.

JOSEPH SPATAFORA, BERNARD
SPATAFORA and VINCENT
SPATAFORA,
Appellees.

3113
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

311 I.A. 36714

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed a distress warrant authorizing the restraint of the personal property of defendants for the sum of \$1,555 for rent of certain premises alleged to be due on July 9, 1932. There was a return made certifying the levy and a list of the property distrained. Henry N. Shabsin, "the duly authorized agent of and Attorney for the Plaintiff in the above entitled cause," filed an affidavit stating that the suit is upon a lease for the premises in question for rentals accruing thereunder for the months of June and July, 1932, and that there was due plaintiffs from defendants, after allowing all just credits, deductions and set-offs, the sum of \$1,555. Defendants filed the plea of general issue and an affidavit of merits, and subsequently filed a notice of set-off, and, still later, a verified plea. The cause was heard by the court without a jury and the trial court found the right to the property in question to be in defendants and assessed their damages at the sum of \$1,660.14, upon their set-off. Plaintiffs appeal from a judgment entered upon the findings. Defendants have filed cross-errors contending that the trial court erred in not allowing defendants damages for the value of certain goods belonging to them that they claim were unlawfully taken possession of by plaintiff John Maypole.

The affidavit of merits attached to defendants' plea is as follows:

"Joseph Spatafora, for and on behalf of himself and on

JOHN B. MAYPOLE and
MAYME E. MAYPOLE,

Appellants,

v.

JOSEPH SPATFORA, BERNARD
SPATFORA and VIRGENT
SPATFORA,

Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

311 A. 887

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed a distress warrant authorizing the
 restraint of the personal property of defendants for the sum
 of \$1,525 for rent of certain premises alleged to be due on
 July 9, 1932. There was a return made certifying the levy and
 a list of the property distrained. Henry M. Shabsin, "the
 duly authorized agent of and Attorney for the Plaintiff in the
 above entitled cause," filed an affidavit stating that the writ
 is upon a lease for the premises in question for rentals accruing
 thereunder for the months of June and July, 1932, and that there
 was due plaintiffs from defendants, after allowing all just credits,
 deductions and set-offs, the sum of \$1,525. Defendants filed the
 plea of general issue and an affidavit of merits, and subsequently
 filed a notice of set-off, and, still later, a verified plea. The
 cause was heard by the court without a jury and the trial court
 found the right to the property in question to be in defendants
 and assessed their damages at the sum of \$1,000.14, upon their
 set-off. Plaintiffs appeal from a judgment entered upon the
 findings. Defendants have filed cross-errors contending that the
 trial court erred in not allowing defendants damages for the value
 of certain goods belonging to them that they claim were unlawfully
 taken possession of by plaintiff John Maypole.

The affidavit of merits attached to defendants' plea is

as follows:

"Joseph Spatfora, for and on behalf of himself and on

behalf of Bernard Spatafora and Vincent Spatafora, being first duly sworn according to law, upon his oath deposes and says that they are the defendants in the above entitled cause and that they have a defense upon the merits to the whole of the plaintiff's demand.

"* * * that the plaintiff's claim is for rent alleged to be due for the months of May and June, 1932, under and by virtue of the terms of a written lease made and entered into by and between the plaintiffs herein and the defendants on the 30th day of September, 1926.

"Affiant further represents that the said lease provides in the rider thereto attached as follows:

"That the lessees shall pay to the lessor, at the office of the lessor in Chicago, the sum of Five Thousand Dollars as rent for the month of October, 1926, and shall pay the sum of Four Hundred Seventy-seven Dollars and Fifty Cents for the month of November, 1926 and a like amount of Four Hundred Seventy-seven Dollars and Fifty Cents on the First day of each and every calendar month thereafter to and including the month of September, 1929; and the sum of Seven Hundred Seventy-seven Dollars and Fifty Cents for the month of October, 1929 and a like amount of Seven Hundred Seventy-seven Dollars and Fifty Cents on the first day of each and every calendar month thereafter to and including the month of March, 1936."

"Affiant further represents that in the rider attached to the lease heretofore referred to, it also provides:

"It being the intention of the parties hereto that the lessee shall pay Four Hundred Seventy-seven Dollars and Fifty Cents per month as rent of said premises during that part of the first three years of the term of this lease and prior to the date of completing the proposed new building and Seven Hundred Fifty-two Dollars and Fifty Cents per month during that part of

defendant's affidavits and answers, being first duly sworn according to law, upon his oath deposes and says that they are the defendants in the above entitled cause and that they have a defense upon the merits to the whole of the plaintiff's demand.

"* * * that the plaintiff's claim is for rent alleged to be due for the months of May and June, 1932, under and by virtue of the terms of a written lease made and entered into by and between the plaintiff herein and the defendants on the 30th day of September, 1926.

"Affiant further represents that the said lease provides in the rider thereto attached as follows:

"That the lessees shall pay to the lessor, at the office of the lessor in Chicago, the sum of Five Thousand Dollars as rent for the month of October, 1926, and shall pay the sum of four hundred seventy-seven Dollars and fifty cents for the month of November, 1926 and a like amount of four hundred seventy-seven Dollars and fifty cents on the first day of each and every calendar month thereafter to and including the month of September, 1927; and the sum of seven hundred seventy-seven Dollars and fifty cents for the month of October, 1927 and a like amount of seven hundred seventy-seven Dollars and fifty cents on the first day of each and every calendar month thereafter to and including the month of March, 1928."

"Affiant further represents that in the rider attached to the lease heretofore referred to, it also provides:

"It being the intention of the parties hereto that the lessee shall pay four hundred seventy-seven Dollars and fifty cents per month as rent of said premises during that part of the first three years of the term of this lease and prior to the date of completing the proposed new building and seven hundred

the first three years of the term of this lease after the completion of the said proposed new building.'

"Affiant further represents that the said lease provided for an additional structure to be built upon the vacant premises which were included as part of the demised premises, and that the lessors did exercise their option.

"Affiant further states that the language of the lease is ambiguous, in that, it states that the rent for the month of October, 1926, in one paragraph shall be Five Thousand Dollars and in a later paragraph, as hereinabove set forth, is the sum of Four Hundred Seventy-seven Dollars and Fifty Cents.

"Affiant further represents that it was not the intention of the lessees to pay the sum of Five Thousand Dollars as rent for the month of October, 1926, but asserts the fact to be that the rent for the month of October, 1926, was the sum of Four Hundred Seventy-seven Dollars and Fifty Cents.

"Affiant further states that prior to entering into the lease the plaintiffs herein agreed to rent the premises to the defendants for the first months of the term of the lease for Five Hundred Dollars and Forty-five Hundred Dollars security money.

"Affiant further states that they insisted to have interest upon said sum of Forty-Five Hundred Dollars at the rate of six per cent per annum, and it was then and there agreed that the sum of Twenty-two Dollars and Fifty Cents be deducted from the Five Hundred Dollars rental money each month and for the latter period of the lease the rent was agreed, prior to the execution of the lease, to be the sum of Eight Hundred Dollars a month and that the sum of Twenty-two Dollars and Fifty Cents be deducted as interest money on the Forty-five Hundred Dollars, as hereinabove set forth, at the rate of six per cent per annum, which made the rental as provided in the lease for the latter part of the term, the sum of Seven Hundred Seventy-Seven Dollars and Fifty Cents.

the first three years of the term of this lease after the

completion of the said proposed new building.

"Affiant further represents that the said lease provided

for an additional structure to be built upon the vacant premises

which were included as part of the leased premises, and that the

lessors did exercise their option.

"Affiant further states that the language of the lease

is ambiguous, in that, it states that the rent for the month of

October, 1926, in one paragraph shall be five thousand dollars

and in a later paragraph, as hereinabove set forth, is the sum of

Four Hundred Seventy-seven Dollars and Fifty Cents.

"Affiant further represents that it was not the intention

of the lessors to pay the sum of Five Thousand Dollars as rent for

the month of October, 1926, but asserts the fact to be that the

rent for the month of October, 1926, was the sum of Four Hundred

Seventy-seven Dollars and Fifty Cents.

"Affiant further states that prior to entering into the

lease the plaintiff herein agreed to rent the premises to the

defendants for the first months of the term of the lease for Five

Hundred Dollars and Forty-five Hundred Dollars seventy money.

"Affiant further states that they insisted to have

interest upon said sum of Forty-five Hundred Dollars at the rate

of six per cent per annum, and it was then and there agreed that

the sum of Twenty-two Dollars and Fifty Cents be deducted from the

Five Hundred Dollars rental money each month and for the latter

period of the lease the rent was agreed, prior to the execution of

the lease, to be the sum of Eight Hundred Dollars a month and that

the sum of Twenty-two Dollars and Fifty Cents be deducted as interest

money on the Forty-five Hundred Dollars, as hereinabove set forth,

at the rate of six per cent per annum, which made the rental as

provided in the lease for the latter part of the term, the sum of

"Affiant further states that the payment of Five Thousand Dollars as rent for the month of October, 1926, was an overpayment and that these defendants are entitled to a credit of Forty-five Hundred Dollars on the rents that are now due and to become due, and your affiant asserts the fact to be that there is no rent due under the terms of said lease and that the rent for May and June, 1932, has been paid in full.

"Affiant further states that these defendants are entitled under the law to prove the circumstances under which the plaintiffs acquired the Forty-five Hundred Dollars for the month of October, 1926, for the reason that the agreement is ambiguous.

"Affiant further states that the plaintiffs herein on the 24th day of May, 1932, instituted in the Municipal Court of Chicago a forcible detainer suit for possession of the premises upon which this suit is based and that a judgment for possession was entered in said cause and a writ of restitution issued by the Municipal Court of Chicago; which was delivered to the Bailiff of the Municipal Court of Chicago; that these defendants were dispossessed of said premises by said Bailiff.

"Affiant further states that the plaintiffs herein took immediate possession of the premises upon the service of the writ of restitution by the Bailiff of the Municipal Court of Chicago and have been in continual possession of said premises since the service of said writ of restitution.

"Affiant further states that the acts of the plaintiffs in taking possession of said premises upon the service of the writ of restitution cancelled said lease and that there is no further liability on said lease, and that these defendants are entitled to a return and a judgment of this court for the difference between the sum of Forty-Five Hundred Dollars and the rent which accrued up to and including the day they were dispossessed.

"Affiant further stated that the defendants are not indebted to the plaintiffs in the sum of Fifteen Hundred Fifty-five

"Affiant further states that the payment of five thousand Dollars as rent for the month of October, 1936, was an overpayment and that these defendants are entitled to a credit of forty-five hundred Dollars on the rents that are now due and to become due, and your affiant asserts the fact to be that there is no rent due under the terms of said lease and that the rent for May and June, 1932, has been paid in full.

"Affiant further states that these defendants are entitled under the law to prove the circumstances under which the plaintiffs acquired the forty-five hundred Dollars for the month of October, 1936, for the reason that the agreement is ambiguous.

"Affiant further states that the plaintiffs herein on the 24th day of May, 1932, instituted in the Municipal Court of Chicago a forcible detainer suit for possession of the premises upon which this suit is based and that a judgment for possession was entered in said cause and a writ of restitution issued by the Municipal Court of Chicago; which was delivered to the Bailiff of the Municipal Court of Chicago; that these defendants were dispossessed of said premises by said Bailiff.

"Affiant further states that the plaintiffs herein took immediate possession of the premises upon the service of the writ of restitution by the Bailiff of the Municipal Court of Chicago and have been in continual possession of said premises since the service of said writ of restitution.

"Affiant further states that the acts of the plaintiffs in taking possession of said premises upon the service of the writ of restitution cancelled said lease and that there is no further liability on said lease, and that these defendants are entitled to a return and a judgment of this court for the difference between the sum of forty-five hundred Dollars and the rent which accrued up to and including the day they were dispossessed.

Dollars, nor in any other sum whatsoever."

The notice of set-off reads as follows:

"TO: C. A. Willard, Attorney for Plaintiffs,
1011 Lake Street
Oak Park, Illinois

"PLEASE TAKE NOTICE that pursuant to the Statute in such cases made and provided, on the hearing of the above entitled cause the defendants will offer proof to show the value of the goods, wares and merchandise, the property of the defendants, pretended to be distrained for rent in the above entitled cause and further that the defendants paid to the plaintiffs the sum of Forty-five Hundred Dollars, lawful money of the United States, on account of rent and as security for default in any payments thereof pursuant to the lease executed between the parties hereto dated the 30th day of September, 1926, by virtue of which the defendants and each of them were in possession of the premises commonly known and described as No. 5901 West Madison Street, Chicago, Illinois, in which the defendants previous to being dispossessed thereof were engaged in the garage business, storing automobiles, and furnishing gas, oil, parts and service for automobiles to the general public and at the time complained of, when they were dispossessed of said premises, the plaintiffs seized under pretense of a distress warrant stock, goods, wares, merchandise and equipment belonging to the defendants and each of them of the value of Three Thousand Dollars and upwards, and the defendants and each of them are therefore entitled to a judgment for the return of the said goods, wares, merchandise, equipment and personal property and the sum of Forty-five Hundred Dollars, or the balance thereof after allowing any deductions therefrom found to be due and owing to the plaintiffs, and will move the court for a finding for the said defendants and for a judgment thereon for said property in the value thereof of Three Thousand Dollars and upwards, and further, in addition thereto, for the balance due of the sum of Forty-five Hundred Dollars, the property

Dollars, not in any other sum whatsoever."

The notice of set-off reads as follows:

"TO: C. A. Wilbur, Attorney for Plaintiff,
1011 Lake Street
Oak Park, Illinois

"PLEASE TAKE NOTICE that pursuant to the Statute in such

cases made and provided, on the hearing of the above entitled cause the defendants will offer proof to show the value of the goods, wares and merchandise, the property of the defendants, pretended to be distrained for rent in the above entitled cause and further that the defendants paid to the plaintiffs the sum of Forty-five Hundred Dollars, lawful money of the United States, on account of rent and as security for default in any payments there- of pursuant to the lease executed between the parties hereto dated the 30th day of September, 1926, by virtue of which the defendants and each of them were in possession of the premises commonly known and described as No. 2001 West Madison Street, Chicago, Illinois, in which the defendants pretend to be- longed and engaged in the garage business, storing, automobiles, and furnishing gas, oil, parts and service for au- tomobiles to the general public and at the time complaint of, when they were dispossessed of said premises, the plaintiffs seized under pretense of a distress without stock, goods, wares, mer- chandise and equipment belonging to the defendants and each of them of the value of Three Thousand Dollars and upwards, and the defendants and each of them are therefore entitled to a judgment for the return of the said goods, wares, merchandise, equipment and personal property and the sum of Forty-five Hundred Dollars, or the balance thereof after allowing any deductions therefrom found to be due and owing to the plaintiffs, and will move the court for a finding for the said defendants and for a judgment thereon for said property in the value thereof of Three Thousand Dollars and upwards, and further, in addition thereto, for the

of the defendants now in possession of the plaintiffs, pursuant to and in manner and form as set forth in the plea and affidavit of merits of the said defendants herein.

"DATED at Chicago, Illinois, this 12th day of December, 1933.

"(SIGNED) ALEXANDER W. JAMIESON
JOHN F. TYRRELL,
Attorneys for Defendants"

Defendants subsequently filed the following verified plea:

"And the defendants, Joseph Spatafora, Bernard Spatafora and Vincent Spatafora, by John F. Tyrrell and Alexander W. Jamieson, their attorneys, for a further plea in this behalf say that the plaintiffs ought not to have their aforesaid action against them, the said defendants, because they say that at the time of the commencement of this suit there was due and owing to the defendants from the plaintiffs the sum of Forty-five Hundred Dollars deposited as security for rent on the premises heretofore conveyed by the plaintiffs to the defendants commonly known as No. 5901 etc. West Madison Street, Chicago, Illinois, heretofore paid to the plaintiffs by Joseph Spatafora on behalf of the defendants on, to-wit: October 1st, 1926 together with rent for the month of October, 1926 and for the personal property and equipment on said premises used in the operation of the same as a garage and for the sale of gasoline oil and automobile supplies and for the repairing of automobiles, tires and equipment thereof; that the said sum of Forty-five Hundred Dollars aforesaid was so deposited with the plaintiffs as a guarantee of the future rent to become due and payable on said premises and more particularly as balance due for the payment of the last six months of the tenancy then existing between the parties hereto and subject to the further and additional payment of Three Hundred Dollars for the said last six months thereof, and in full payment for the rent on said premises from the 1st day of April, 1936 to the 30th day of September, 1936; that the plaintiffs claim there was due

of the defendants now in possession of the plaintiffs, pursuant to and in manner and form as set forth in the plea and affidavit of merits of the said defendants herein.

"DATED at Chicago, Illinois, this 10th day of December,

1933.

"(SIGNED) ALFRED W. LANDMAN

JOHN F. LANDMAN

Attorneys for defendants

Defendants subsequently filed the following verified plea:
"And the defendants, Joseph Spators, Bernard Spators, and Vincent Spators, by John F. Landman and Alexander A. Landman, their attorneys, for a further plea in this behalf say that the plaintiffs ought not to have their proposed action against them, the said defendants, because they say that at the time of the commencement of this suit there was due and owing to the defendants from the plaintiffs the sum of forty-five hundred dollars deposited as security for rent on the premises heretofore conveyed by the plaintiffs to the defendants commonly known as No. 2201 etc, West Madison Street, Chicago, Illinois, heretofore paid to the plaintiffs by Joseph Spators on behalf of the defendants on, to-wit: October 1st, 1932 together with rent for the month of October, 1932 and for the personal property and equipment on said premises used in the operation of the same as a garage and for the sale of gasoline oil and automobile supplies and for the repairing of automobiles, tires and equipment thereof; that the said sum of forty-five hundred dollars aforesaid was so deposited with the plaintiffs as a guarantee of the future rent to become due and payable on said premises and more particularly as balance due for the payment of the last six months of the tenancy then existing between the parties hereto and subject to the further and additional payment of three hundred dollars for the said last six months thereof, and in full payment for the rent on said premises from the 1st day of April, 1932 to the

and owing from the defendants at the commencement of the above entitled cause the sum of Two Thousand Eight Hundred Thirty-nine Dollars and Eighty-six Cents, the amount of which the defendants deny, but which thereby leaves a balance due and owing to the plaintiffs [defendants] of Sixteen Hundred Sixty Dollars and Fourteen Cents of the money so deposited as rent as aforesaid in the sum of Forty-five Hundred Dollars, which balance aforesaid becomes due and owing to the defendants by reason of the defendants having been forcibly removed from the premises at 5901 etc. West Madison Street, Chicago, Illinois, by the election of the plaintiffs to recover the possession of the said premises, which proceedings were so commenced in the Municipal Court of the City of Chicago before the commencement of the above entitled cause.

"Defendants further show that at about the time of the commencement of the forcible entry proceedings in the Municipal Court of Chicago the plaintiffs elected to confess judgment on said lease for the alleged indebtedness due the plaintiffs on said lease for the alleged indebtedness due the plaintiffs in the sum of One Thousand Two Hundred Thirteen Dollars and Eighty-seven Cents, including as part of said judgment the sum of One Hundred Thirty-six Dollars and Thirty-seven Cents for attorney's fees, for rent due and owing to the plaintiffs; that in said proceedings in the Municipal Court of Chicago the judgment so rendered by confession on said lease was vacated and set aside after a full hearing thereon and after the judge had announced his findings in favor of the defendants and against the plaintiffs the court permitted the plaintiffs to take a non-suit.

"And the defendants for a further plea in this behalf say that the plaintiffs ought not to have their aforesaid action against them, the defendants, because they say that at the time of the commencement of this suit the plaintiffs were in the possession of the sum of Forty-five Hundred Dollars deposited as security for rent on the premises commonly known and described as 5901 etc.

and owing from the defendants at the commencement of the above
entitled cause the sum of two thousand eight hundred thirty-nine
dollars and eighty-six cents, the amount of which the defendants
deny, but which thereby leaves a balance due and owing to the
plaintiffs [defendants] of sixteen hundred sixty dollars and
fourteen cents of the money so deposited as rent as aforesaid in
the sum of forty-five hundred dollars, which balance aforesaid
becomes due and owing to the defendants by reason of the defendants
having been forcibly removed from the premises at 5901 etc. West
Madison Street, Chicago, Illinois, by the action of the plaintiffs
to recover the possession of the said premises, which proceedings
were so commenced in the Municipal Court of the City of Chicago
before the commencement of the above entitled cause.

"Defendants further show that at about the time of the
commencement of the forcible entry proceedings in the Municipal
Court of Chicago the plaintiffs elected to confess judgment on
said lease for the alleged indebtedness due the plaintiffs on
said lease for the alleged indebtedness due the plaintiffs in the
sum of one thousand two hundred thirty-seven dollars and eighty-seven
cents, including as part of said judgment the sum of one hundred
thirty-six dollars and thirty-seven cents for attorney's fees,
for rent due and owing to the plaintiffs; that in said proceedings
in the Municipal Court of Chicago the judgment so rendered by con-
fession on said lease was vacated and set aside after a full hear-
ing thereon and after the judge had announced his findings in favor
of the defendants and against the plaintiffs the court permitted
the plaintiffs to take a non-suit.

"And the defendants for a further plea in this behalf say
that the plaintiffs ought not to have their aforesaid action against
them, the defendants, because they say that at the time of the
commencement of this suit the plaintiffs were in the possession of
the sum of forty-five hundred dollars constituting an equity for

West Madison Street, Chicago, Illinois, on to-wit: October 1st, 1926; that said sum of money while deposited as security for rent at the election of the plaintiffs in exercising their right to terminate said lease the same became subject to any indebtedness between the plaintiffs and defendants for rent only on said premises and that after allowing to the plaintiffs all such sum or sums of money as may have been due to the plaintiffs from the defendants at the institution of this suit there was due and owing to the defendants the sum of Sixteen Hundred Sixty Dollars and Fourteen Cents; that the plaintiffs by virtue of the distress warrant filed herein and these proceedings commenced pursuant thereto did levy on the personal property and business of the defendants bought from the plaintiffs for which the defendants paid the sum of Three Thousand Dollars to the plaintiffs; that the defendants ^[plaintiffs] took possession of the same and appropriated the same to their own use and have persisted in retaining said personal property as aforesaid; that the defendants from time to time had added thereto until the value thereof was not less than Thirty-five Hundred Dollars and that said property so taken and retained by the plaintiffs is of the value of to-wit: Thirty-five Hundred Dollars and that there remains due and owing to the defendants from the plaintiffs therefor the sum of to-wit: Thirty-five Hundred Dollars for the business and personal property of the defendants so unlawfully taken as aforesaid.

"Wherefore the defendants pray judgment if the plaintiffs ought to have their aforesaid action and that the defendants have and recover judgment against the plaintiffs in the sum of not less than Sixteen Hundred Sixty Dollars and Fourteen Cents and the further and additional sum of not less than, to-wit: Thirty-five Hundred Dollars for the business and personal property so taken, or in the alternative either or both of said sums in the amounts hereinabove described and set forth.

"(Signed) JOSEPH SPATAFORA
BERNARD SPATAFORA
VINCENT SPATAFORA
Defendants

West Madison Street, Chicago, Illinois, on or about October 1st, 1926; that said sum of money was deposited as security for rent at the election of the plaintiff in exercising their right to terminate said lease the same became subject to said plaintiff between the plaintiff and defendant for rent only on said premises and that after allowing to the plaintiff all such sum or sums of money as may have been due to the plaintiff from the defendant at the institution of this suit there was due and owing to the defendant the sum of sixteen hundred sixty dollars and fourteen Cents; that the plaintiff by virtue of the distress warrant filed herein and these proceedings commenced pursuant thereto did levy on the personal property and business of the defendant bought from the plaintiff for which the defendant paid the sum of three thousand Dollars to the plaintiff; that the defendant took possession of the same and appropriated the same to their own use and have persisted in retaining said personal property as aforesaid; that the defendant from time to time had added thereto until the value thereof was not less than thirty-five hundred Dollars and that said property so taken and retained by the plaintiff is of the value of to-wit: thirty-five hundred Dollars and that there remains due and owing to the defendant from the plaintiff therefor the sum of to-wit: thirty-five hundred Dollars for the business and personal property of the defendant so unlawfully taken as aforesaid.

"Wherefore the defendant pray judgment if the plaintiff ought to have their aforesaid action and that the defendant in view and recover judgment against the plaintiff in the sum of not less than sixteen hundred sixty Dollars and fourteen Cents and the fourth and additional sum of not less than to-wit: thirty-five hundred Dollars for the business and personal property so taken, or in the alternative either or both of said sums in the amount hereinabove described and set forth.

"By JOHN F. TYRRELL
ALEXANDER W. JAMIESON
Attorneys for Defendants"

The demurrer filed by plaintiffs to the plea was subsequently withdrawn and they thereafter filed a general and special demurrer to the plea, but no order was ever entered in reference to the same.

Plaintiffs contend that there was no ambiguity in the lease touching the payment of rent; that all previous conversations and negotiations leading up to the signing of the lease merged in the written instrument; that the trial court erred in admitting testimony of previous negotiations and conversations that tended to vary, change or contradict the terms of the lease.

The lease provides that plaintiffs, lessors, leased to defendants, lessees, "for a public garage only, the premises known and described as follows, to-wit: one story garage at 5901 and 5903, and the vacant lot located at 5905 and 5907 West Madison Street, together with the appurtenances thereto belonging * * *. To Have and To Hold The Same for and during the term commencing on the First day of October, A. D., One Thousand Nine Hundred and Twenty-six (1926), and expiring on the Thirtieth (30th) day of September, A. D., One Thousand Nine Hundred and Thirty-Six (1936), inclusive." The lease further provides: "First:- Lessee shall pay to Lessor, the rent hereinafter set forth in the rider hereto attached and made a part hereof." The material part of the rider reads as follows:

"It is further covenanted and agreed by and between the lessor and the lessees named in the lease of the premises situated at Nos. 5901 to 5907, both inclusive, West Madison Street, Chicago, Illinois, to which lease this additional agreement is attached and of which it is hereby made a part, that the lessees shall pay to the lessor, at the office of the lessor in Chicago, the sum of Five Thousand Dollars as rent for the month of October, 1926,

"BY JOHN A. WYMAN
ALFRED A. LAMSON
Attorneys for Defendants"

The demurrer filed by plaintiffs to the plea was sub-

sequently withdrawn and they thereafter filed a general and special demurrer to the plea, but no order was ever entered in reference to the same.

Plaintiffs contend that there was no ambiguity in the

lease touching the payment of rent; that all previous conversations and negotiations leading up to the signing of the lease merged in the written instrument; that the trial court erred in admitting testimony of previous negotiations and conversations that tended to vary, change or contradict the terms of the lease.

The lease provides that plaintiffs, lessors, leased to defendants, lessees, "for a public garage only, the premises known and described as follows, to-wit: one story garage at 2901 and 2903 and the vacant lot located at 2905 and 2907 West Madison Street, together with the appurtenances thereto belonging * * *. To have and to hold the same for and during the term commencing on the first day of October, A. D., one thousand nine hundred and twenty-six (1926), and expiring on the thirtieth (30th) day of September, A. D., one thousand nine hundred and thirty-six (1936), inclusive." The lease further provides: "First- Lessee shall pay to Lessor the rent herein after set forth in the list hereto attached and made a part hereof." The material part of the rider reads as follows:

"It is further covenanted and agreed by and between the Lessor and the Lessees named in the lease of the premises situated at Nos. 2901 to 2907, both inclusive, West Madison Street, Chicago, Illinois, to which lease this additional agreement is attached and of which it is hereby made a part, that the Lessees shall pay to the Lessor, at the office of the Lessor in Chicago, the sum of

and shall pay the sum of Four Hundred Seventy-seven Dollars and Fifty Cents for the month of November, 1926 and a like amount of Four Hundred Seventy-seven Dollars and Fifty Cents on the First day of each and every calendar month thereafter to and including the month of September, 1929; and the sum of Seven Hundred Seventy-seven Dollars and Fifty Cents for the month of October, 1929 and a like amount of Seven Hundred Seventy-seven Dollars and Fifty Cents on the first day of each and every calendar month thereafter to and including the month of March, 1936; and the sum of Three Hundred Dollars on the first day of April, 1936 as rent for the months of April, May, June, July, August and September, 1936. The lessees shall also pay to the lessor the sum of Two Hundred Seventy-five Dollars per month on the first day of each and every calendar month from the date of the completion of the proposed new building to be erected on that part of the demised premises known as Nos. 5905 and 5907 West Madison Street, to and including the month of September, 1929; it being the intention of the parties hereto that the lessee shall pay Four Hundred Seventy-seven Dollars and Fifty Cents per month as rent of said premises during that part of the first three years of the term of this lease and prior to the date of completing the proposed new building and Seven Hundred Fifty-two Dollars and Fifty Cents per month during that part of the first three years of the term of this lease after the completion of the said proposed new building.

"It is further understood and agreed that the lessor shall, at his expense, construct a one story brick garage on that part of the premises known as Nos. 5905 and 5907 West Madison Street, covering substantially all of the vacant part of the demised premises, and shall have the same completed, ready for occupancy, on or about the first day of September, 1927." (*Italics ours.*)

In view of the ambiguity in the rider we are of the opinion that the trial court was justified in allowing defendants to prove

and shall pay the sum of Four Hundred Seventy-seven Dollars and Fifty Cents for the month of November, 1926 and a like amount of Four Hundred Seventy-seven Dollars and Fifty Cents on the first day of each and every calendar month thereafter to and including the month of September, 1927; and the sum of Seven Hundred Seventy-seven Dollars and Fifty Cents for the month of October, 1927 and a like amount of Seven Hundred Seventy-seven Dollars and Fifty Cents on the first day of each and every calendar month thereafter to and including the month of March, 1928; and the sum of Three Hundred Dollars on the first day of April, 1928 as rent for the months of April, May, June, July, August and September, 1928. The lessees shall also pay to the lessor the sum of Two Hundred Seventy-five Dollars per month on the first day of each and every calendar month from the date of the completion of the proposed new building to be erected on that part of the demised premises known as Nos. 7905 and 7907 West Madison Street, to and including the month of September, 1929; it being the intention of the parties hereto that the lessees shall pay Four Hundred Seventy-seven Dollars and Fifty Cents per month as rent of said premises during that part of the first three years of the term of this lease and prior to the date of completing the proposed new building and Seven Hundred Fifty-two Dollars and Fifty Cents per month during that part of the first three years of the term of this lease after the completion of the said proposed new building.

"It is further understood and agreed that the lessor shall at his expense, construct a one story brick garage on that part of the premises known as Nos. 7905 and 7907 West Madison Street, covering substantially all of the vacant part of the demised premises, and shall have the same completed, ready for occupancy, on or about the first day of September, 1927." (Italics ours.)

In view of the ambiguity in the rider we are of the opinion that the total amount payable by the lessees to the lessor is

that the actual rent for the month of October, 1926, was \$500, and that the \$5,000 paid by defendants to plaintiffs included the said rent and \$4,500 deposit as security for rent to be applied on the rent for the last six months of the lease. The oral testimony overwhelmingly sustains defendants' contention that Maypole and defendants agreed upon a rental of \$500 per month until the new building was erected, when the rent was to be \$775 per month until September 30, 1929, and thereafter \$800 per month; that Maypole demanded security for the rent and defendants agreed to put up \$4,500 as security but demanded that they must be allowed interest on the \$4,500, and that Maypole agreed to defendants' demand; that after Maypole's attorney had figured the interest per annum on \$4,500 at six per cent, it was agreed that after the first month's rent, upon which defendants would not be entitled to interest, interest should be allowed defendants by deducting \$22.50 per month from the rent during the tenure of the lease, the \$4,500 deposit to be used as rent for the last six months of the term, with \$300 additional, less interest, payable on April 1, 1936; that, accordingly, defendants were to pay \$500 rent for October, 1926; \$477.50 per month, thereafter, until the new building was built, and \$752.50 per month during any part of the first three years after completion of the proposed new building; after which the rent was to be \$777.50 per month. At the time the deal between the parties was consummated and the lease signed defendants gave Maypole a certified check for \$8,000. It is agreed that Maypole charged defendants \$3,000 for the garage business (defendants had \$5,000 to their credit in the Columbia State Savings Bank but they were obliged to make a \$3,000 loan with the bank in order to consummate the deal with plaintiffs), and it is agreed that \$3,000 of the \$8,000 check represented a payment by defendants for the business. There is a dispute between the parties as to what the \$5,000 balance of the check represented. The check bears upon its face the following notations in typewriting: "Dep. \$4500 Rent \$500 Bus. \$3000."

that the actual rent for the month of October, 1926, was \$700, and that the \$7,000 paid by defendants to plaintiffs included the said rent and \$4,500 deposit as security for rent to be applied on the rent for the last six months of the lease. The oral testimony overwhelmingly sustains defendants' contention that Maypole and defendants agreed upon a rental of \$700 per month until the new building was erected, when the rent was to be \$775 per month until September 30, 1929, and thereafter \$800 per month; that Maypole demanded security for the rent and defendants agreed to put up \$4,500 as security but demanded that they must be allowed interest on the \$4,500, and that Maypole agreed to defendants' demand; that after Maypole's attorney had figured the interest per annum on \$4,500 at six per cent, it was agreed that after the first month's rent, upon which defendants would not be entitled to interest, interest should be allowed defendants by deducting \$22.50 per month from the rent during the tenure of the lease, the \$4,500 deposit to be used as rent for the last six months of the term, with \$300 additional, less interest, payable on April 1, 1930; that accordingly, defendants were to pay \$500 rent for October, 1926; \$477.50 per month, thereafter, until the new building was built, and \$752.50 per month during any part of the first three years after completion of the proposed new building; after which the rent was to be \$777.50 per month. At the time the deal between the parties was consummated and the lease signed defendants gave Maypole a certified check for \$8,000. It is agreed that Maypole charged defendants \$3,000 for the garage business (defendants had \$5,000 to their credit in the Columbia State Savings Bank but they were obliged to make a \$3,000 loan with the bank in order to consummate the deal with plaintiffs), and it is agreed that \$3,000 of the \$8,000 check represented a payment by defendants for the business. There is a dispute between the parties as to what the \$7,000 balance of the check represented. The check bears upon its face the following

Joseph Spatafora testified that when the bank O.K.'d the loan to defendants, he went to the bank teller and had a check made out to John B. Maypole and Wife and asked the teller to put on the face of the check what it was given for, and the bank's typist then put on the face of the check the notations as to deposit, rent and business, and that after the check was certified by the bank Spatafora gave the check to Maypole. Charles [Vincent] Spatafora and V. M. Patano corroborated this testimony of Joseph Spatafora. Maypole testified that the notations were not on the check when he received it, but the trial court disbelieved this testimony, and after a consideration of the oral testimony and the check itself we are satisfied that the trial court was justified in believing the testimony of defendants' witnesses and disbelieving Maypole's testimony. Maypole, a man of some affairs, had full opportunity to call employees of the bank to impeach defendants' testimony as to the check, but he did not do so. Maypole's testimony that it was distinctly agreed between defendants and himself that defendants were to pay \$5,000 rent for the month of October, 1926, his testimony in reference to the check, and the high-handed manner in which he treated defendants, all tend to show that little weight, if any, can be given his testimony. The lease was drawn by plaintiffs' attorney, Mr. Mills, and it is very significant that while Maypole testified as to the negotiations and conversations leading up to the execution of the lease he did not call Mr. Mills, who took part in the negotiations, to corroborate his testimony that it was agreed between the parties that defendants should pay the astonishing sum of \$5,000 as rent for the month of October, 1926. The brazen position of Maypole, that if defendants had defaulted in the payment of rent for the month of November, 1926, and were then legally ousted from the premises by plaintiffs, the latter would be entitled to retain the \$5,000 as rent for the month of October, was so unconscionable that no one would believe his testimony on any disputed question of fact. The oral testimony, that plaintiffs claim should not have

Joseph Spatola testified that when the bank called the loan to defendants, he went to the bank teller and had a check made out to John B. Maypole and wife and asked the teller to put on the face of the check what it was given for, and the bank's typist then put on the face of the check the notations as to deposit, rent and business, and that after the check was certified by the bank Spatola gave the check to Maypole. Charles [Witness] Spatola and V. M. Patano corroborated this testimony of Joseph Spatola. Maypole testified that the notations were not on the check when he received it, but the trial court disbelieved this testimony, and after a consideration of the oral testimony and the check itself we are satisfied that the trial court was justified in believing the testimony of defendants' witnesses and disbelieving Maypole's testimony. Maypole, a man of some affairs, had full opportunity to call employees of the bank to impeach defendants' testimony as to the check, but he did not do so. Maypole's testimony that it was distinctly agreed between defendants and himself that defendants were to pay \$5,000 rent for the month of October, 1926, his testimony in reference to the check, and the high-handed manner in which he treated defendants, all tend to show that little weight, if any, can be given his testimony. The lease was drawn by plaintiffs' attorney, Mr. Mills, and it is very significant that while Maypole testified as to the negotiations and conversations leading up to the execution of the lease he did not call Mr. Mills, who took part in the negotiations, to corroborate his testimony that it was agreed between the parties that defendants should pay the aforementioned sum of \$5,000 as rent for the month of October, 1926. The proven position of Maypole, that if defendants had defaulted in the payment of rent for the month of November, 1926, and were then legally ousted from the premises by plaintiffs, the latter would be entitled to receive the \$5,000 as rent for the month of October, was so unreasonable that no one would believe his testimony on any disputed question.

been admitted, simply clarified the terms of the lease as to rent, and it would have amounted to a miscarriage of justice if the trial court had held with plaintiffs that the rights of the parties must be determined solely from the language of the lease that provided that \$5,000 should be paid as rent for the month of October, 1926.

Plaintiffs contend, "Even if the \$4,500 should be construed as being a deposit, the defense set up in defendants' affidavit of merits, the matters set up in their notice of set-off, and the evidence in support thereof, all comprise a claim or demand not due at the time this distress suit was filed. It was, therefore, not a legal defense to this suit, nor a proper subject of set-off." It is a sufficient answer to this contention to say that neither by any pleading nor by any motion, nor by any proper objection raised during the hearing, did plaintiffs raise the question involved in the aforesaid contention, and they will not be heard to raise it here. Moreover, there is no merit in the contention.

On May 24, 1932, plaintiffs instituted, in the Municipal Court of Chicago, a forcible entry and detainer suit for the possession of the premises in question and on July 25, 1932, recovered a judgment for possession. On August 1, 1932, a writ of restitution issued, which was executed on August 2, and on August 8, 1932, defendants, under that writ, were dispossessed of the premises. Maypole admitted that he thereupon took possession of the entire premises and that he has "been running the [garage] business" upon the premises ever since. The evidence also shows that Maypole took possession of the personal property in the garage and has been using it in the garage business operated by him upon the premises. In the present proceedings plaintiffs, in their affidavit in support of the distress warrant, claimed that there was due them the sum of \$1,550 for rent for the months of June and July. Plaintiffs obtained possession of the premises on August 8, 1932, and it would appear, therefore, that at that time they were entitled to only three months' rent, at \$777.50 per month,

been admitted, simply clarified the terms of the lease as to rent, and it would have amounted to a miscarriage of justice if the trial court had held with plaintiffs that the rights of the parties must be determined solely from the language of the lease that provided that \$2,000 should be paid as rent for the month of October, 1936. Plaintiffs contend, "Even if the \$4,500 should be construed as being a deposit, the defense set up in defendants' affidavit of merits, the matters set up in their notice of set-off, and the evidence in support thereof, all comprise a claim or demand not due at the time this distress suit was filed. It was, therefore, not a legal defense to this suit, nor a proper subject of set-off." It is a sufficient answer to this contention to say that neither by any pleading nor by any motion, nor by any proper objection raised during the hearing, did plaintiffs raise the question involved in the aforesaid contention, and they will not be heard to raise it here. Moreover, there is no merit in the contention.

On May 24, 1932, plaintiffs instituted, in the Municipal Court of Chicago, a forcible entry and detainer suit for the possession of the premises in question and on July 27, 1932, recovered a judgment for possession. On August 1, 1932, a writ of restitution issued, which was executed on August 2, and on August 8, 1932, defendants, under that writ, were dispossessed of the premises. Maypole admitted that he thereupon took possession of the entire premises and that he has "been running the [garage] business" upon the premises ever since. The evidence also shows that Maypole took possession of the personal property in the garage and has been using it in the garage business operated by him upon the premises. In the present proceeding, plaintiffs, in their affidavit in support of the distress warrant, claimed that there was due them the sum of \$1,500 for rent for the months of June and July. Plaintiffs obtained possession of the premises on August 8, 1932, and it would appear, therefore, that at that time they were entitled to only three months' rent, at \$500 per month,

but we find in the record a statement made to the court by defendants' attorney that plaintiffs were entitled to \$2,839.86 for rent due when Maypole took possession. The record does not show upon what basis counsel figured that amount due, but, in any event, the trial court allowed plaintiffs that amount, and, certainly, they cannot complain of the amount allowed them. The trial court, after holding that \$4,500 of the \$5,000 paid by defendants to plaintiffs was a deposit, deducted \$2,839.86 from \$4,500 and allowed defendants upon their plea of set-off judgment for the difference, \$1,660.14. If we are right in holding, as we do, that \$4,500 of the \$5,000 paid was a deposit, plaintiffs have no cause to complain of the judgment.

Defendants have filed cross-errors in which they contend that "the trial court erred in not entering judgment in favor of defendants on that part of their set-off for the value of the goods unlawfully taken possession of by the plaintiff, John Maypole." This contention is not seriously argued and the only case cited in support of the contention is not in point. Defendants' and plaintiffs' evidence shows that the goods in question are in the garage and that they have been used there in the garage business by John Maypole ever since he took possession of same. It is clear from the evidence that Maypole acts for himself and Mayme E. Maypole, his wife. In a distress for rent proceeding, when judgment is in favor of the defendant, "he shall recover costs and have judgment for return of the property distrained, unless the same has been replevied or released from such distress." (Ill. Rev. Stat. 1939, chap. 80, sec. 25.) But in the instant case defendants did not seek, in the trial court, a return of the goods, but asked the trial court to enter judgment in their favor for the value of the goods. The trial court, under the evidence and the statute, was justified in refusing to allow defendants' request.

The judgment of the Circuit court of Cook county is a just one and it should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P.J., and Sullivan, J., concur.

but we find in the record a statement made to the court by defendants' attorney that plaintiffs were entitled to \$2,839.86 for rent due when Maypole took possession. The record does not show upon what basis counsel figured that amount due, but, in any event, the trial court allowed plaintiffs that amount, and, certainly, they cannot complain of the amount allowed them. The trial court, after holding that \$4,500 of the \$7,000 paid by defendants to plaintiffs was a deposit, deducted \$2,839.86 from \$4,500 and allowed defendants upon their plea of set-off judgment for the difference, \$1,660.14. If we are right in holding, as we do, that \$4,500 of the \$7,000 paid was a deposit, plaintiffs have no cause to complain of the judgment.

Defendants have filed cross-errors in which they contend that "the trial court erred in not entering judgment in favor of defendants on that part of their set-off for the value of the goods unlawfully taken possession of by the plaintiff, John Maypole." This contention is not seriously argued and the only case cited in support of the contention is not in point. Defendants' and plaintiffs' evidence shows that the goods in question are in the garage and that they have been used there in the garage business by John Maypole ever since he took possession of same. It is clear from the evidence that Maypole acts for himself and Maypole & Maypole, his wife. In a distress for rent proceeding, when judgment is in favor of the defendant, "he shall recover costs and have judgment for return of the property distrained, unless the same has been relieved or released from such distress." (Ill. Rev. Stat. 1939, chap. 80, sec. 25.) But in the instant case defendants did not seek, in the trial court, a return of the goods, but asked the trial court to enter judgment in their favor for the value of the goods. The trial court, under the evidence and the contentions, was justified in refusing to allow defendants' request.

The judgment of the Circuit court of Cook county is

40873

14A

H. P. RAMMING,
Appellant,

v.

THE BELT RAILWAY COMPANY OF
CHICAGO, a corporation, and
THE ATCHISON, TOPEKA & SANTA
FE RAILWAY COMPANY, a cor-
poration,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

311 L.A. 367²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action for damages for personal injuries alleged to have been sustained by plaintiff while driving his automobile over a railroad crossing when his automobile was struck by a Diesel engine, with a caboose attached thereto, belonging to one of defendants. Plaintiff was severely injured, and Steve Bolo, who was also riding in the automobile, was killed. Upon a former trial of the case plaintiff dismissed Indiana Harbor Belt Railroad Company, a corporation, from the case. In the instant trial a jury returned a verdict finding The Belt Railway Company of Chicago, a corporation, and The Atchison, Topeka & Santa Fe Railway Company, a corporation, defendants, guilty and assessed plaintiff's damages at \$6,400. Judgment was entered upon the verdict. One week after the entry of the judgment defendants filed a written motion to vacate the judgment and to enter a judgment in their favor notwithstanding the verdict; also a motion in arrest of judgment, and a further motion for a new trial. Thereafter the trial court entered an order vacating the judgment and entered judgment for defendants notwithstanding the verdict of the jury. Plaintiff appeals.

No point is made as to the pleadings.

The complaint charges, in substance, the following breaches of duty:

"(a) General charge of negligence;

"(b) Failure to have bell of at least 30 pounds' weight

H. P. HARRING
Appellant,

v.

THE BELT RAILWAY COMPANY OF
CHICAGO, a corporation, and
THE ATCHISON, TOPEKA & SANTA
FE RAILWAY COMPANY, a cor-
poration,
Appellees.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

311 A. 307

MR. JUSTICE SCAGLAN DELIVERED THE OPINION OF THE COURT.

An action for damages for personal injuries alleged to

have been sustained by plaintiff while driving his automobile

over a railroad crossing when his automobile was struck by a

diesel engine, with a caboose attached thereto, belonging to one

of defendants. Plaintiff was severely injured, and Steve Solo,

who was also riding in the automobile, was killed. Upon a

former trial of the case plaintiff dismissed Indiana Harbor

Belt Railroad Company, a corporation, from the case. In the

instant trial a jury returned a verdict finding The Belt Railway

Company of Chicago, a corporation, and The Atchison, Topeka &

Santa Fe Railway Company, a corporation, defendants, jointly and

assessed plaintiff's damages at \$4,400. Judgment was entered

upon the verdict. One week after the entry of the judgment

defendants filed a written motion to vacate the judgment and to

enter a judgment in their favor notwithstanding the verdict;

also a motion in arrest of judgment, and a further motion for

a new trial. Thereafter the trial court entered an order vacating

the judgment and entered judgment for defendants notwithstanding

the verdict of the jury. Plaintiff appeals.

No point is made as to the pleadings.

The complaint charges, in substance, the following

breaches of duty:

"(a) General charge of negligence;

or whistle rung or whistled by engineer or fireman at a distance of at least 80 rods from crossing and kept ringing and whistling until the said crossing was reached;

"(c) Charges defendants with maintaining tracks for the movement of trains at crossing, which was an unusually dangerous and hazardous one; maintaining a flagman who failed to signal plaintiff on approach of the locomotive;

"(d) Charges maintenance of unusually hazardous and dangerous crossing and failure to have safety gates, automatic wig-wags, flashers or bells for warning approaching traffic of the approach of trains;

"(e) Charges operation of locomotive and cars at a high and dangerous rate of speed without timely warning of its approach;

"(f) Charges wilful and wanton conduct in the operation and management of locomotive and cars."

The answer of defendant The Belt Railway Company of Chicago denies all of the allegations of negligence and damages and alleges that if plaintiff was injured "said injuries were proximately caused by the wilful and wanton negligence of the said plaintiff;" also denies possession and control of locomotive and "cars." The answer of defendant The Atchison, Topeka & Santa Fe Railway Company denies all of the allegations of negligence and damages and alleges that if plaintiff was injured "said injuries were proximately caused by the willful and wanton negligence of the said plaintiff and his own reckless indifference to consequences and surrounding conditions and circumstances;" denies ownership, possession and control of the yards, tracks and switches.

"The plaintiff's theory is that the defendants were guilty of negligence in the following particulars:

"1. As to the crossing involved:

"(a) Failure to adequately protect a hazardous and dangerous crossing, heavily traveled by a main arterial highway, (Pulaski

or whistle run or whistled by engine or locomotive at a distance of at least 80 rods from crossing and kept ringing and whistling until the said crossing was reached;

"(c) Charges defendants with maintaining blocks for

the movement of trains at crossing, which was an unusually dangerous and hazardous one; maintaining a flagman who failed to signal plaintiff on approach of the locomotive;

"(d) Charges maintenance of unusually hazardous and dangerous crossing and failure to have safety gates, automatic wig-wags, flashers or bells for warning approaching traffic of the approach of trains;

"(e) Charges operation of locomotive and cars at a high

and dangerous rate of speed without timely warning of its approach;

"(f) Charges willful and wanton conduct in the operation

and management of locomotive and cars."

The answer of defendant The Belt Railway Company of

Chicago denies all of the allegations of negligence and damages

and alleges that its plaintiff was injured "said injuries were

proximately caused by the willful and wanton negligence of the said

plaintiff;" also denies possession and control of locomotive and

"cars." The answer of defendant The Jackson, Lake & Santa Fe

Railway Company denies all of the allegations of negligence and

damages and alleges that its plaintiff was injured "said injuries

were proximately caused by the willful and wanton negligence of

the said plaintiff and his own reckless indifference to conse-

quences and surrounding conditions and circumstances;" denies

ownership, possession and control of the yards, tracks and

switches.

"The plaintiff's theory is that the defendants were

guilty of negligence in the following particulars:

"1. As to the crossing involved:

"(a) Failure to adequately protect a hazardous and danger-

Road - formerly Crawford Avenue) in close proximity to a parallel and equally heavily traveled arterial highway (Archer Avenue) by -

"(a1) Total failure to install or equip with -

"(ab1) Safety gates;

"(ab2) Automatic wig-wags, flashers or bells -

in violation of a common law duty to exercise ordinary care in view of the peculiar and particular physical facts and surrounding circumstances.

"2. As to the operation of the train itself:

"(a) Inadequate warning of approach of train and failure to comply with the statutory regulations with respect thereto."

The following is defendants' theory of fact: "The plaintiff did not make out a prima facie case because, disregarding any evidence of defendants, it is apparent to all reasonable minds that plaintiff's own negligence caused the collision."

Plaintiff strenuously contends that the trial court erred in entering a judgment in favor of defendants and against plaintiff for costs notwithstanding the verdict of the jury which found plaintiff's damages at the sum of \$6,400; that plaintiff made out a prima facie case and that the court invaded the province of the jury in entering the instant judgment. A careful reading of the evidence satisfies us that plaintiff's contention is a meritorious one.

In support of their contention that the judgment should be sustained defendants make the following points:

"1. Where the evidence, with all legitimate inferences that can justifiably and legally be drawn therefrom, does not tend to show due care on the part of plaintiff, the trial court should instruct the jury to return a verdict for the defendant; or, after verdict, it should grant defendants' motion for judgment notwithstanding the verdict.

"2. In order for plaintiff to recover he has the burden

Road - formerly Crawford Avenue, in close proximity to a railroad and equally heavily traveled arterial highway (rather Avenue)

by -

"(a1) Total failure to install on a ship with -

"(a1) Safety Gates;

"(a2) Automatic air-ways, firebars or bells -

in violation of a common law duty to exercise ordinary care in view of the peculiar and particular physical facts and surrounding circumstances,

"2. As to the operation of the train itself:

"(a) Inadequate warning of approach of train and failure

to comply with the statutory regulations with respect thereto."

The following is defendant's theory of fact: "The plain-

tiff did not make out a prima facie case because, disregarding any evidence of defendant, it is apparent to all reasonable minds that plaintiff's own negligence caused the collision."

Plaintiff strenuously contends that the trial court erred in entering a judgment in favor of defendant and against plaintiff for costs notwithstanding the verdict of the jury which found plaintiff's damages at the sum of \$6,400; that plaintiff made out a prima facie case and that the court invaded the province of the jury in entering the instant judgment. A careful reading of the evidence attests as that plaintiff's contention is a meritorious one.

In support of this contention that the judgment should be sustained defendant make the following points:

"1. Where the evidence, with all legitimate inferences that can justifiably and legally be drawn therefrom, does not tend to show due care on the part of plaintiff, the trial court should instruct the jury to return a verdict for the defendant; or, after verdict, it should grant defendant's motion for judgment notwithstanding the verdict.

of proving that at the time of his injury he was free from negligence, which proximately contributed to the injury.

"3. There may be such inherent improbability or negative quality in the testimony of a witness as to authorize a court to disregard it, even though there is no contradictory evidence by other witnesses."

It appears, therefore, that defendants, to sustain the judgment, rely solely upon their contention that plaintiff failed to make out a prima facie case that he was in the exercise of due care for his own safety at the time of and just prior to the accident.

In a number of cases we called attention to the fact that some trial judges, in personal injury cases, are directing juries to find for defendants and are entering judgments non obstante veredicto in cases where plaintiffs had made out a prima facie case, and in an effort to stop this practice we have several times restated long-settled principles of law that should govern the action of a trial court in passing upon said motions. Nevertheless, records continue to come before us wherein trial judges, in passing upon said motions, weigh the evidence and pass upon the credibility of witnesses. In the present case, the able lawyers for defendants by sheer persistence, alone, finally induced the trial judge to enter an unwarranted judgment. At the conclusion of plaintiff's evidence defendants made a motion in writing for a peremptory instruction to find each of the defendants not guilty, and the motion was accompanied by a proper instruction. The trial judge, after argument, denied the motion and refused the instruction. At the conclusion of all the evidence defendants made their motion in writing for a peremptory instruction to find each of the defendants not guilty, and the trial court, after argument, reserved the ruling. After the jury had returned its verdict defendants moved for judgment notwithstanding the verdict and also moved for a new trial. Plaintiff moved for judgment on the verdict. The trial court, after argument,

of proving that at the time of his injury he was free from negligence, which proximately contributed to the injury.

"3. There may be such inherent improbability or negative quality in the testimony of a witness as to authorize a court to disregard it, even though there is no contradictory evidence by other witnesses."

It appears, therefore, that defendants, to sustain the judgment, rely solely upon their contention that plaintiff failed to make out a prima facie case that he was in the exercise of due care for his own safety at the time of and just prior to the accident.

In a number of cases we called attention to the fact that some trial judges, in personal injury cases, are directing juries to find for defendants and are entering judgments non obstante verdicto in cases where plaintiffs had made out a prima facie case, and in an effort to stop this practice we have several times restated long-settled principles of law that should govern the action of a trial court in passing upon said motions. Nevertheless, records continue to come before us wherein trial judges, in passing upon said motions, weigh the evidence and pass upon the credibility of witnesses. In the present case, the sole lawyers for defendants by sheer persistence, alone, finally induced the trial judge to enter an unwarranted judgment. At the conclusion of plaintiff's evidence defendants made a motion in writing for a peremptory instruction to find each of the defendants not guilty, and the motion was accompanied by a proper instruction. The trial judge, after argument, denied the motion and refused the instruction. At the conclusion of all the evidence defendants made their motion in writing for a peremptory instruction to find each of the defendants not guilty, and the trial court, after argument, reserved the ruling. After the jury had returned its verdict defendants moved for judgment notwithstanding the verdict and also moved for a new trial. Plaintiff

denied defendants' motion for judgment non obstante veredicto and entered judgment upon the verdict. A week later defendants filed a written motion to vacate the judgment; to enter a judgment in defendants' favor, notwithstanding the verdict; also a motion in arrest of judgment and for a new trial, and thereafter the trial court vacated the judgment and entered a judgment in favor of defendants notwithstanding the verdict of the jury. It appears from the record that upon a former trial of this case Judge Trude, at the conclusion of plaintiff's evidence, denied motions of defendants for a peremptory instruction to find them not guilty.

In Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill. App. 14, the court was called upon to pass upon a contention that the trial court erred in not entering a judgment for the defendant notwithstanding the verdict of the jury. The court said (pp. 25, 26):

"At common law, a judgment non obstante veredicto could only be entered when the plea confessed the cause of action and set up matters in avoidance of the cause of action which were, even if true, immaterial and did not constitute a defense to the action. It is a judgment for the plaintiff on the pleadings because the pleas of the defendant do not present a defense. It was only rendered on the application of the plaintiff, and was never allowed on motion of the defendant. Puterbaugh's Common Law Pleading, sec. 1103.

"It is provided however by sec. 68, par. (3)a, of the Civil Practice Act, Cahill's Rev. St. 1933, ch. 110, par. 196, that at the close of the testimony either party may request the court for a directed verdict and that the court can reserve its decision thereon, and submit the case to the jury and after verdict may hear arguments for and against such request and if the court shall decide as a matter of law that the party requesting the directed verdict was entitled thereto, the court shall enter its decision on the record and order judgment in accordance with such

denied defendants' motion for judgment notwithstanding the verdict. A week later defendants entered judgment upon the verdict. A week later defendants filed a written motion to vacate the judgment; to enter a judgment in defendants' favor, notwithstanding the verdict; also a motion in arrest of judgment and for a new trial, and thereafter the trial court vacated the judgment and entered a judgment in favor of defendants notwithstanding the verdict of the jury. It appears from the record that upon a former trial of this case Judge Irwin, at the conclusion of plaintiff's evidence, granted motions of defendants for a peremptory instruction to find them not guilty.

In Illinois Telephone Ass'n v. Springfield Spring Bank, 282 Ill. App. 14, the court was called upon to pass upon a contention that the trial court erred in not entering a judgment for the defendant notwithstanding the verdict of the jury. The court said (pp. 25, 26):

"At common law, a judgment non obstante verdicto could only be entered when the plea confessed the cause of action and set up matters in avoidance of the cause of action which were, even if true, immaterial and did not constitute a defense to the action. It is a judgment for the plaintiff on the pleadings because the pleas of the defendant do not present a defense. It was only rendered on the application of the plaintiff, and was never allowed on motion of the defendant. Irwin's Common Law Pleading, sec. 1103.

"It is provided however by sec. 65, par. (3), of the Civil Practice Act, Smith's Rev. St. 193, ch. 110, par. 190, that at the close of the testimony either party may request the court for a directed verdict and that the court can reserve its decision thereon, and submit the case to the jury and after verdict may hear arguments for and against such request and if the court shall decide as a matter of law that the party requesting the directed verdict was entitled thereto, the court shall enter its

decision notwithstanding the verdict. This provision of the Civil Practice Act changes the common law rule and permits either party to move the court for judgment notwithstanding the verdict.

"The court in passing upon the motion must decide, as a matter of law, that the party requesting the directed verdict is entitled thereto. This provision of the Civil Practice Act taken in connection with Rule 22 of the Rules of Practice of the Supreme Court which provides: 'The power of the court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence in the case, it would have been the duty of the court to direct a verdict without submitting the case to the jury,' requires the court to be governed by the same rules in passing upon a motion for a judgment notwithstanding the verdict as govern it in passing upon a motion for a directed verdict. The trial court in passing upon this motion has no more authority to weigh and determine controverted questions of fact under the Civil Practice Act than under the Practice Act of 1907. Capelle v. Chicago & N. W. Ry. Co., 280 Ill. App. 471."

In Valant v. Metropolitan Life Ins. Co., 302 Ill. App. 196, the court said (p. 204):

"Under the authorities above discussed, we are of opinion that under the evidence, the question of whether there had been an impersonation of Kazimer Valant by another was, in the first instance, a question for the jury, and therefore the court erred in entering judgment for plaintiff, notwithstanding the verdict. On such a motion [motion for judgment for plaintiff notwithstanding the verdict], the court is not authorized to weigh the evidence. Boyda Dairy Co. v. Continental Casualty Co., 299 Ill. App. 469; White v. City of Belleville, 364 Ill. 577; McNeill v. Harrison & Sons, Inc., 286 Ill. App. 120. But if there is any evidence tending to support the defense, the case must go to the jury; and if the court is of opinion that the verdict of the jury is not sustained by a preponderance of the evidence, it is his duty, under the law, to set aside the

decision notwithstanding the verdict. This provision of the Civil Practice Act changes the common law rule and permits either party to move the court for judgment notwithstanding the verdict.

"The court in passing upon the motion must decide, as a matter of law, that the party requesting the directed verdict is entitled thereto. This provision of the Civil Practice Act taken in connection with Rule 22 of the rules of practice of the Supreme Court which provides: 'The power of the court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence in the case, it would have been the duty of the court to direct a verdict without submitting the case to the jury,' requires the court to be governed by the same rules in passing upon a motion for a judgment notwithstanding the verdict as govern it in passing upon a motion for a directed verdict. The trial court in passing upon this motion has no more authority to weigh and determine controverted questions of fact under the Civil Practice Act than under the Practice Act of 1907. Capelee v. Chicago & N. W. Ry. Co., 280 Ill. App. 471."

In Valent v. Metropolitan Life Ins. Co., 302 Ill. App. 196, the court said (p. 204):

"Under the authorities above discussed, we are of opinion that under the evidence, the question of whether there had been an impersonation of Maximer Valent by another was, in the first instance, a question for the jury, and that for the court error in entering judgment for plaintiff, notwithstanding the verdict. On such a motion [motion for judgment for plaintiff notwithstanding the verdict], the court is not authorized to weigh the evidence. Dairy Co. v. Continental Casualty Co., 283 Ill. App. 409; Witt v. City of Belleville, 364 Ill. 577; McNeill v. Harrison & Son, Inc., 286 Ill. App. 120. But if there is any evidence tending to support the defense, the case must go to the jury; and if the court is of opinion that the verdict of the jury is not sustained by a preponder-

verdict and award a new trial." We might cite a number of other cases to the same effect.

As the power of the court to enter a judgment non obstante veredicto can only be exercised in a case where it would have been the duty of the court to direct a verdict, we will again state the well-settled rules that govern a trial court in passing upon a motion to instruct the jury to find for a defendant.

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rusch, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296-7.)' (Mahan v. Richardson, 284 Ill. App. 493, 495.)

"The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact. (Chicago, St. Louis and Pittsburg Railroad Co. v. Hutchinson, 120 Ill. 587; Austin v. Public Service Co., ante, p. 112.) Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must

verdict and award a new trial." "The right to a new trial of course cases to the same effect.

As the power of the court to enter a judgment non est, verdicts can only be entered in a case where it could have been the duty of the court to direct a verdict, we will again state the well-settled rules that govern a trial court in passing upon a motion to instruct the jury to find for a defendant.

"A motion to instruct the jury to find for the defendant

is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Farquhar, 228 Ill. 138; Id. v. Id., 227 Ill. 489. (Hunter v. Troup, 11 Ill. 232, 239-40.) (Mahan v. Richardson, 284 Ill. App. 425, 427.)

"The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact. (Chicago, St. Louis and Northern Illinois R.R. Co. v. Hutchinson, 120 Ill. 287; Wentz v. Illinois Central R.R. Co., 112 Ill. 287.) Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must

agree that the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence.' (Petro v. Hines, 299 Ill. 236, 240. See, also, Pollard v. Broadway Central Hotel Corp., 353 Ill. 312, 322, 323.)

"Whether a plaintiff was guilty of contributory negligence is ordinarily a question of fact for the jury to decide under proper instructions. It becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence. (Thomas v. Buchanan, 357 Ill. 270; Mueller v. Phelps, 252 id. 630; O'Rourke v. Sproul, 241 id. 576.) A motion to direct a verdict for the defendant preserves for review only a question of law whether from the evidence in favor of the plaintiff, standing alone and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff. (Brophy v. Illinois Steel Co., 242 Ill. 55; City of Chicago v. Jarvis, 226 id. 614.) We cannot weigh the evidence to determine, as a matter of fact, whether the plaintiff was guilty of contributory negligence, (Dukeman v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co., 237 Ill. 104,) and we cannot reject testimony as improbable unless it is contrary to some natural law. (Zetsche v. Chicago, Peoria and St. Louis Railway Co., 238 Ill. 240.)' (Zirardo v. Lynch Co., 365 Ill. 197, 199-200.)" (Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110, 111.)

In the celebrated case of Libby, McNeill & Libby v. Cook, 222 Ill. 206, the court said (p. 213): "Evidence fairly tending to prove the cause of action set out in the declaration may be the testimony of one witness only, and he may be directly contradicted by twenty witnesses of equal or greater credibility; still the motion must be denied, and if a verdict for the plaintiff follows, the question whether it is manifestly against the weight of the evidence is for the trial court upon motion for a new trial, and, in the event of that motion being overruled and a judgment entered, for

agree that the defendant has not negligently caused the injury was the result of plaintiff's own negligence. (Harris v. Hotel Corp., 353 Ill. 312, 313, 323.)

"Whether a plaintiff was guilty of contributory negligence is ordinarily a question of fact for the jury to decide under proper instructions. It becomes a question of law only when the evidence is so clearly insufficient to establish one case that all reasonable minds would reach the conclusion that there was contributory negligence. (Thomas v. Neenan, 327 Ill. 240; Miller v. Phelps, 352 Ill. 630; O'Brien v. Brown, 341 Ill. 374.) A motion to direct a verdict for the defendant preserves for review only a question of law whether from the evidence in favor of the plaintiff, standing alone and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff. (Groody v. Illinois Steel Co., 312 Ill. 55; City of Chicago v. Jarvis, 316 Ill. 514.) We cannot weigh the evidence to determine, as a matter of fact, whether the plaintiff was guilty of contributory negligence. (McLean v. Cleveland Cincinnati, Chicago and St. Louis Railway Co., 327 Ill. 104.) and we cannot reject testimony as improbable unless it is contrary to some natural law. (Zetsche v. Chicago, Rock Island and St. Louis Railway Co., 238 Ill. 240.) (Harris v. Hotel Corp., 353 Ill. 312, 313, 323.) (Thomson v. Chicago Motor Coach Co., 327 Ill. 604, 610, 611.)

In the celebrated case of Appleton v. Appleton, 100 N.Y. 222 Ill. 206, the court said (p. 211): "Evidence fairly tending to prove the case of action set out in the declaration may be the testimony of one witness only, and may be directly contradicted by twenty witnesses of equal or greater credibility; still the motion must be denied, and if a verdict for the plaintiff follows, the question whether it is manifestly against the weight of the evidence is for the trial court upon not on for a new trial, and, in the

the Appellate Court upon error properly assigned."

As bearing upon plaintiff's contention that at the time and place in question he was in the exercise of ordinary care for his own safety, we find that there is evidence tending to prove the following facts: On January 14, 1936, about 5:30 p.m., after darkness had set in, plaintiff was driving his automobile north on Crawford avenue (Pulaski road). Crawford avenue runs north and south. The first track he approached was the track of the Belt Railway Company, a single track, where the accident occurred. This track runs southwest and northeast across Crawford avenue. About 125 feet north of this track and parallel to it are the double tracks of the Indiana Harbor Belt Railroad Company. About 250 feet north of these tracks is a highway, Archer avenue, that runs northeast and southwest and intersects Crawford avenue. Archer avenue parallels the track of the Belt Railway Company and also the tracks of the Indiana Harbor Belt Railroad Company. Traffic on Archer avenue and on Crawford avenue was heavy at the time of the accident. The nearest street light to the place of the accident was an arc light on the southeast corner of Archer avenue. There was a red light stop sign at the Archer avenue intersection. As one approached the track of the Belt Line Railway Company there was no reflector or any kind of warning sign, no automatic wigwag or flasher of any kind. There was a crossing sign seven feet south of the south rail of the track and twelve feet to the east of the east edge of Crawford avenue. On the crossarm of this crossing sign there was at the time of the accident a kerosene lantern with a red bull's-eye light lens. This light had only a five-eighths inch high kerosene wick. There was smoke on the inside of the lantern and dirt on the outside and the light could not be seen until a person approached within three or four feet of the post upon which the lantern was hanging. All along the pavement at the place of the accident there were weeds growing thickly and which

the Appellate Court upon error properly assigned.

As bearing upon plaintiff's contention that at the time and place in question he was in the exercise of ordinary care for his own safety, we find that there is evidence tending to prove the following facts: On January 14, 1935, about 7:30 p.m., after darkness had set in, plaintiff was driving his automobile north on Crawford Avenue (Prison Road). Crawford Avenue runs north and south. The first track he approached was the track of the Belt Railway Company, a single track, where the accident occurred. This track runs southwest and northeast about Crawford Avenue. About 125 feet north of this track and parallel to it are the double tracks of the Indiana Harbor Belt Railroad Company. About 250 feet north of these tracks is a highway, Archer Avenue. That runs northeast and southwest and intersects Crawford Avenue. Archer Avenue parallels the track of the Belt Railway Company and also the tracks of the Indiana Harbor Belt Railroad Company. Traffic on Archer Avenue and on Crawford Avenue was heavy at the time of the accident. The nearest street light to the place of the accident was an arc light on the southeast corner of Archer Avenue. There was a red light stop sign at the Archer Avenue intersection. As one approached the track of the Belt Railway Company there was no reflector or any kind of warning sign, no automatic signal or flasher of any kind. There was a crossing sign seven feet south of the south rail of the track and twelve feet to the west of the east edge of Crawford Avenue. On the crossing of this crossing sign there was at the time of the accident a person standing with a red bull's-eye light lamp. This light had only a five-light inch high kerosene wick. There was smoke on the inside of the lantern and dirt on the outside and the light could not be seen until a person approached within three or four feet of the post upon which the lantern was hanging. All along the pavement at the place of the accident there were weeds growing thickly and which

stood six to seven feet high at the time of the accident. Through the weeds one could see only about one length of rail, about 75 feet, to the east. Plaintiff at the time of the accident was unfamiliar with the place in question. As he was driving north he saw the red light stop sign at the Archer avenue intersection and slowed down for that intersection, and looking to the right and left he saw all kinds of lights going up and down Archer avenue, "red lights, big lights and high lights, saw all kinds of lights." When he saw the cross-arm railroad warning sign he was within twelve or fifteen feet of it and he stepped on his brake to still further slow down for the Indiana Harbor Belt Railroad Company's tracks, the double tracks, and he did not become aware of the existence of the single track, the Belt Line Railway track, where the accident occurred, until the front wheels of his automobile crossed the first rail of that track, at which moment he was hit by the locomotive. He did not see the kerosene lamp hanging on the cross-arm nor did he see nor hear the engine before it hit him. One of defendants' witnesses testified that he did not hear a bell or whistle until after the crash; and that although he had passed the place of the accident several times at night, he never noticed the lamp burning. It was shown that this witness, who was following plaintiff just before the accident occurred, stated at the coroner's inquest that he first saw the engine when it was fifty feet away; that he was familiar with the crossing and that after one passes the crossing sign he has but four or five feet to go until he hits the first rail of the track involved in the accident. Another witness testified that the latter witness had to swerve his car off the road to avoid being struck by the engine. There was also evidence that "the beam of this locomotive as it would come from the northeast going southwest was the same direction that the lights of motor vehicles on Archer Avenue would shine if they were coming from the northeast going southwest." A witness testified that the sound of the warning on the engine was like a bus horn. There is evidence for defendants

stood six to seven feet high at the time of the accident. Through the weeds one could see only about one fourth of rail, about 75 feet, to the east. Plaintiff at the time of the accident was unfamiliar with the place in question, as he was driving north he saw the red light stop sign at the Archer Avenue intersection and slowed down for that intersection, and looking to the right and left he saw all kinds of lights going up and down Archer Avenue, "red lights, big lights and high lights, saw all kinds of lights." When he saw the cross-arm railroad warning sign he was within twelve or fifteen feet of it and he stopped on his tracks to still further slow down for the Indiana Harbor Belt Railroad Company's tracks, the double tracks, and he did not become aware of the existence of the single track, the Belt Line Railway track, where the accident occurred, until the front wheels of his automobile crossed the first rail of that track, at which moment he was hit by the locomotive. He did not see the kerosene lamp hanging on the cross-arm nor did he see nor hear the engine before it hit him. One of defendants' witnesses testified that he did not hear a bell or whistle until after the crash; and that although he had passed the place of the accident several times at night, he never noticed the lamp hanging. It was shown that this witness, who was following Plaintiff just before the accident occurred, at 10:10 p.m. on the night that he first saw the engine when it was flying over the crossing and crossing familiar with the crossing and that after one passes the crossing sign he has but four or five feet to go until he hits the first rail of the track involved in the accident. Another witness testified that the latter witness had to leave his car off the road to avoid being struck by the engine. There was also evidence that "the beam of this locomotive as it would come from the northeast being southward was the same direction that the lights of motor vehicles on Archer Avenue would shine if they were coming from the northeast going southwest." A witness testified that the sound of the warning on

that shows clearly that the day following the accident defendants placed plain warning signs south of the Belt Line Railway Company's track, where the accident occurred; that one of the signs was a "tall one with the automatic flasher."

It is unnecessary for us to cite all of the facts relied upon by plaintiff's counsel to support their claim that plaintiff made out a prima facie case, as the able lawyers for defendants, in an effort to sustain the judgment, are forced to argue, in their brief, as to the weight of plaintiff's evidence and that his witnesses lack credibility. Indeed, they close their brief with the following statement: "* * * there was no credible evidence in the whole case to show that plaintiff used due care for his own safety." (Italics ours.) In arguing that we should disregard certain evidence, defendants state: "A premium would be placed on dishonesty and error if trial courts and Appellate Courts were denied the right to examine and appraise the internal quality of testimony." Defendants' counsel devote pages in their brief to an analysis of the evidence of plaintiff, and they argue that it is filled with contradictions, improbabilities, discrepancies and omissions; that it contains within itself its own impeachment; that plaintiff gives two accounts of the manner in which the accident happened; that any reasonable analysis of the many contradictions in his story leads to the conclusion that he did not look at all as he approached the tracks. The plain purpose of the argument is to destroy the probative value of plaintiff's testimony. This argument would be pertinent and proper if we had before us a question as to whether the verdict of the jury was against the manifest weight of the evidence. John Bonney, a police officer of Chicago assigned to the Accident Prevention Division, was an important witness for plaintiff. He testified, inter alia, that he came to the place of the accident within fifteen minutes after it occurred; that he was going north on Crawford avenue as he approached the place of the accident; that the only "signal"

that shows clearly that the day following the accident defendant placed plain warning signs south of the West Main Railway Company's track, where the accident occurred; that one of the signs was a "fall one with the automatic flasher."

It is unnecessary for us to cite all of the facts relied upon by plaintiff's counsel to support their claim that defendant made out a prima facie case, as the old lawyers for defendants, in an effort to sustain the judgment, are bound to argue, in their brief, as to the weight of plaintiff's evidence and that in this case lack of disability. Instead, they close their brief with the following statement: " * * * there was no credible evidence in the whole case to show that plaintiff was injured by the defendant's negligence."

(Italics ours). In arguing that we should disregard certain evidence, defendants state: "A premium would be placed on economy and error in trial courts and appeal to courts would be the right to examine and appraise the internal quality of testimony." Defendants' counsel devote pages in their brief to an analysis of the evidence of plaintiff, and they argue that it is filled with contradictions, improbabilities, discrepancies and omissions; that it contains within itself its own refutation; that plaintiff gives two accounts of the sum in which the accident happened; that any reasonable analysis of the many contradictions in his story leads to the conclusion that he did not look at all as he approached the trucks. The plain purpose of the argument is to destroy the probative value of plaintiff's testimony. This argument would be pertinent and proper if we had before us a question as to whether the verdict of the jury was against the manifest weight of the evidence. John Bonney, a police officer of Chicago assigned to the accident investigation Division, was an important witness for plaintiff. He testified inter alia, that he came to the place of the accident within fifteen minutes after it occurred; that he was going north on Grand Avenue as he approached the place of the accident; that the only "skid"

he found was a kerosene lantern with a red bull's-eye light in it; that the lens of the lamp was two and a half inches to three inches in diameter; that the condition of the lens was smoky; that he walked over to the post where the lantern was suspended to see if it was burning and that he came within three or four feet of the lantern before he could tell whether it was burning or not; that darkness had fallen at the time and travel on Archer and Crawford avenues was continuous; that "this old crossing signal" at the time of the accident was approximately seven feet south of the south line of the first railroad track and twelve feet east of the eastern edge of Crawford avenue; that as you approached the track from the south there was no reflector or any kind of sign there, no automatic wigwag or flasher of any kind; that he had noticed the condition of the lantern prior to the night in question, that sometimes it was clean and sometimes it was dirty; that the land that the track in question ran through was filled up with weeds; that at the time of the accident "they varied as high as 6 feet high;" that "they were fairly dense." In seeking to destroy the probative effect of Bonney's testimony defendants state that Switchman Gibson testified that he could plainly see the red light on the cross-arm some 200 feet or more back northeast; that witnesses Zak and Kirby stated that the lens was not dirty or dusty; that Kirby stated that he saw the lens when he was about 100 feet away from it. Counsel argue that Bonney's testimony is not "entirely reliable" because the lamp was produced at the trial and it was shown by actual measurement "to be a 5-inch lens with curvature and 4-3/4 across." Counsel further state: "But, more important than this, when we consider the amazing story that Bonney told regarding the taking of 4 photographs by him next day after the accident, we may doubt whether he is a credible witness at all. He was asked to produce or account for the films. He said that he had his camera open too much and that the pictures 'burned up' from the snow which had fallen since the accident. The records

he found was a kerosene lantern with a red glass eye light in it; that the lens of the lamp was two and a half inches to three inches in diameter; that the condition of the lens was smoky; that he walked over to the post where the lantern was suspended to see if it was burning and that he came within three or four feet of the lantern before he could tell whether it was burning or not; that darkness had fallen at the time and travel in Arden and Crawford avenues was uncommon; that this old meeting place at the time of the accident was a residential street south of the south line of the first railroad track and twelve feet east of the eastern edge of Crawford avenue; that as you approached the track from the south there was no reflection on any kind of sign there, no automatic highway or light of any kind; that he had noticed the condition of the lantern prior to the night in question that sometimes it was clean and sometimes it was dirty; that the land that the track in question ran through was filled up with weeds; that at the time of the accident "they varied as high as six feet high;" that "they were fairly dense." In seeking to destroy the probative effect of Conroy's testimony defendant states that Switchman Gibson testified that he could plainly see the red light on the cross-arm some 200 feet or more back northward; that witnesses Ask and Kirby stated that the lens was not dirty or smoky; that Kirby stated that he saw the lens when he was about 100 feet away from it. Counsel argues that Conroy's testimony is not "entirely reliable" because the lamp was produced at the trial and it was shown by actual measurement "to be a 7-inch lens with curvature and 4-3/4 across." Counsel further states: "That, more important than this, when we consider the amazing story that Gibson told regarding the taking of a photograph by him on the day after the accident, we may doubt whether he is a credible witness at all. He was asked to produce an account for the films. He said that he had his camera open too much and that the pictures 'blurred up' from the snow which had fallen since the accident. The records

of the Accident Prevention Bureau of the City of Chicago were brought in by that department's official photographer and they established that Bonney did not turn in any films which were 'burnt up' and that if he had done so they would be in the negative container. Finally, it was shown by the U. S. weather report data that no snow fell in Chicago all day January 15th, from 7 A.M. to 7 P.M." The counsel further state that Bonney is the only witness who testified that the crossing lamp was not plainly visible to all traffic approaching the crossing, and that "Bonney's testimony is not credible evidence."

It would unduly lengthen this opinion to cite further excerpts from defendants' brief that show that defendants are constantly forced to argue as to the weight of the evidence and the credibility of the witnesses. Plaintiff's counsel is justified in contending that defendants' entire discussion of the facts is practically an argument as to the credibility of the witnesses and the weight that should be attached to their testimony.

In support of their contention that we have a right, in passing upon the action of the trial court in entering a judgment non obstante veredicto, to disregard, in toto, certain evidence introduced by plaintiff, defendants cite Hadley v. White, 367 Ill. 406. That case, of course, does not sustain defendants' position. There the trial court had heard the testimony in a chancery proceeding and the point was made upon appeal that the court's findings were palpably contrary to the weight of the testimony. The Supreme court called attention to the fact that the trial judge had seen the witnesses and listened to their testimony and that the findings of the court were well supported by competent evidence. The statement in the opinion to the effect that there might be so many omissions, discrepancies and improbabilities in the testimony of a witness as to justify a court or jury in disregarding it in its entirety has no bearing upon a motion for judgment non obstante veredicto.

of the Accident Prevention Bureau of the City of New York were brought in by that department's official photographer and they established that "Donny" did not turn in any film which were "burnt up" and that it had been done so they could be in the negative container. Finally, it was shown by the U. S. weather report data that no snow fell in Chicago on any January 19th, from 7 A.M. to 7 P.M. The counsel further stated that "Donny" is the only witness who testified that the crossing lamp was not plainly visible to all traffic approaching the crossing, and that "Donny's" testimony is not credible evidence."

It would unduly lengthen this opinion to cite further excerpts from defendants' brief that show that defendants are constantly forced to argue as to the weight of the evidence and the credibility of the witnesses. Plaintiff's counsel is justified in contending that defendants' entire misstatement of the facts is precisely an argument as to the credibility of the witnesses and the weight that should be attached to their testimony.

In support of their contention that we have a right, in passing upon the action of the trial court in admitting a judgment non obstante veritate, to disregard, in toto, certain evidence introduced by plaintiff, defendants cite Wiley v. Wiley, 307 Ill. 406. That case, of course, does not sustain defendants' position. There the trial court had heard the testimony in a summary proceeding and the point was made upon appeal that the court's finding were palpably contrary to the weight of the testimony. The Supreme Court called attention to the fact that the trial judge had seen the witnesses and listened to their testimony and that the finding of the court were well supported by competent evidence. The statement in the opinion to the effect that there might be some omissions, discrepancies and inaccuracies in the testimony of a witness as to exactly a court or jury in disregarding it in its entirety has no bearing upon a motion for judgment non obstante veritate.

By anything that we have said we do not mean to imply that we have any opinion as to the credibility of witnesses or the weight, if any, that should be attached to their testimony, as the alternative motion of defendants for a new trial is not before us, and it is for the trial court to pass upon said motion. (See Goodrich v. Sprague, 376 Ill. 80.)

Holding, as we do, that the trial court erred in entering judgment non obstante veredicto, the judgment of the Circuit court of Cook county is reversed and the cause is remanded with directions to the trial court to pass upon defendants' motion for a new trial, and for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED, AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

By anything that we have said we do not mean to imply that we have any opinion as to the credibility of witnesses or the weight, if any, that should be attached to their testimony, as the alternative motion of defendants for a new trial is not before us, and it is for the trial court to pass upon said motion. (See

Goodrich v. Lawrence, 76 Ill. 30.)

Holding, as we do, that the trial court erred in entering judgment non obstante veritate, the judgment of the circuit court of Cook county is reversed and the case is remanded with directions to the trial court to pass upon defendants' motion for a new trial, and for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED, AND CAUSE
REMANDED WITH DIRECTIONS.

TRIED, P. J., and WILLIAM J. CONNOR.

41002

JOSEPH SOLOMON,
Plaintiff,

v.

MOSES I. BAYLES et al.,
Defendants.

WINGYLE CORPORATION, a corporation,
as assignee of rights of Joseph
Solomon, Plaintiff, since deceased,
(Moving Party) Appellant,

v.

MOSES I. BAYLES, NETTIE BAYLES,
SAMUEL J. RICHMAN and THE PRUDEN-
TIAL INSURANCE COMPANY OF AMERICA,
a corporation,
(Respondents) Appellees.

15a
APPEAL FROM SUPERIOR
COURT OF COOK
COUNTY.

311 I.A. 368

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Wingyle Corporation, a corporation, as assignee of rights of Joseph Solomon, plaintiff, from an order entered May 29, 1939, denying its motion in writing to vacate and set aside an order theretofore entered on May 25, 1933, dismissing the cause for want of prosecution.

The instant cause, a bill in chancery to foreclose a mechanic's lien, was commenced by Joseph Solomon. The cause was referred to Master Behan on June 17, 1924, and on October 24, 1930, defendants closed their proofs. On the same date the master ordered plaintiff to close the rebuttal evidence by November 6, 1930. Many continuances followed because the parties failed to appear, and on June 8, 1931, the master entered an order declaring proofs closed and requested the lawyers to submit the testimony and exhibits so that he might prepare his report. While the hearing was in progress before the master Moses I. Bayles and Nettie Bayles, his wife, defendants, conveyed the premises in question to defendant Samuel J. Richman, an attorney, who had been active in the hearing before the master. On June 6, 1931, Joseph Solomon, complainant, died testate and his will was probated in the Probate court of Cook

JOSEPH SOLOMON,
Plaintiff,

v.

MOSES I. BAYLES et al.,
Defendants.

APPEAL FROM SUPERIOR

COURT OF COOK

COUNTY.

WINGLYE CORPORATION, a corporation,
as assignee of rights of Joseph
Solomon, Plaintiff, since deceased,
(Moving Party), Appellant,

v.

MOSES I. BAYLES, WETLIE BAYLES,
SAMUEL J. RICHMAN and THE
FIDELITY INSURANCE COMPANY OF AMERICA,
a corporation,
(Respondents), Appellees.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Winglye Corporation, a corporation, as assignee of rights of Joseph Solomon, Plaintiff, from an order entered May 29, 1932, denying its motion in writing to vacate and set aside an order theretofore entered on May 25, 1932, dismissing the cause for want of prosecution.

The instant cause, a bill in chancery to foreclose a mechanic's lien, was commenced by Joseph Solomon. The cause was referred to Master Behan on June 17, 1934, and on October 24, 1930, defendants closed their proofs. On the same date the master ordered Plaintiff to close the rebuttal evidence by November 6, 1930. Many continuances followed because the parties failed to appear, and on June 8, 1931, the master entered an order declaring proofs closed and requested the lawyers to submit the testimony and exhibits so that he might prepare his report. While the hearing was in progress before the master Moses I. Bayles and Wettle Bayles, his wife, defendants, conveyed the premises in question to defendant Samuel J. Richman, an attorney, who had been active in the hearing before the master. On June 6, 1931, Joseph Solomon, complainant,

county, and on August 6, 1931, letters testamentary were issued to his widow, Bessie Solomon. The claim involved in the instant cause was inventoried and by an order entered in the Probate court it was sold by the executrix to Pearl S. Olenick, who afterward sold and assigned it to appellant, Wingyle Corporation. On May 25, 1933, as heretofore stated, the cause was dismissed for want of prosecution, while it was still pending before the master. On May 17, 1938, the motion of appellant to set aside the order of dismissal was filed, and on May 23 an amendment to the motion was filed. The motion states that it is based upon Section 72 of the Civil Practice Act; that Joseph Solomon, complainant, was deceased at the time of the entry of the order dismissing the cause; that such fact did not appear of record, and that it constituted such error of fact as might be corrected by motion in the nature of a writ of error coram nobis. Defendants filed motions to dismiss or deny the motion, as amended, filed by appellant, and afterward defendants Bayles and Richman filed their amended motion. Upon this appeal it is only necessary to state that the motion of Bayles and Richman, defendants, challenged the jurisdiction of the court to entertain in a chancery proceeding a motion under Section 72. Defendants' motions were overruled by the trial court and thereupon they filed their several answers and amendments thereto to the motion of appellant as amended. There was a hearing before the trial court and at the conclusion of the same the trial court entered the order of May 29, 1939, from which appellant appeals.

Appellant contends, inter alia, that Section 72 applies to a chancery case. Defendants contend, inter alia, that it does not. The Supreme court, on April 10, 1941, filed an opinion in Frank v. Salomon, 376 Ill. 439, holding that Section 72 of the Civil Practice Act is not applicable to chancery proceedings. The court quotes with approval (p. 443) the following from Tosetti Brewing Co. v. Koehler, 200 Ill. 369: "'In an action at law the statute abolishing the writ of error coram nobis and substituting

county, and on August 6, 1931, letters testamentary were issued to his widow, Bessie Solomon. The claim involved in the instant cause was inventoried and by an order entered in the probate court it was sold by the executor to Pearl S. Glenshaw, who afterward sold and assigned it to Appellate, Mining Corporation. On May 25, 1933, as heretofore stated, the cause was dismissed for want of prosecution, while it was still pending before the master. On May 17, 1938, the motion of appellant to set aside the order of dismissal was filed, and on May 23 an amendment to the motion was filed. The motion states that it is based upon Section 75 of the Civil Practice Act; that Joseph Solomon, co-plaintiff, was deceased at the time of the entry of the order dismissing the cause; that such fact did not appear of record, and that it constituted such error of fact as might be corrected by motion in the nature of a writ of error coram nobis. Defendants filed motions to dismiss or deny the motion, as amended, filed by appellant, and afterward defendants Bayles and Richman filed their amended motion. Upon this appeal it is only necessary to state that the motion of Bayles and Richman, defendants, challenged the jurisdiction of the court to entertain in a chancery proceeding a motion under Section 75. Defendants' motions were overruled by the trial court and thereon they filed their several answers and amendments thereto to the motion of appellant as amended. There was a hearing before the trial court and at the conclusion of the same the trial court entered the order of May 29, 1939, from which appellant appeals.

Appellant contends, inter alia, that Section 75 applies to a chancery case. Defendants contend, inter alia, that it does not. The Supreme Court, on April 16, 1941, filed an opinion in Frank v. Salomon, 376 Ill. 459, holding that Section 75 of the Civil Practice Act is not applicable to chancery proceedings. The court quotes with approval (p. 443) the following from Forst, Brewing Co. v. Kohler, 200 Ill. 399: "In an action at law the

therefor a motion, authorizes the court to set aside a judgment at any time within five years, for an error of fact that came within the scope of the writ as it existed at common law. *** The statutory motion does not apply to cases in chancery. *** The proper method of impeaching and setting aside a decree after the term is to file an original bill in the nature of a bill of review, when such decree may be set aside, reversed or modified, according to the equities of the parties.'" On June 4, 1941, a rehearing was denied in the Frank case.

The judgment order of the Superior court of Cook county of May 29, 1939, is affirmed.

JUDGMENT ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

therefor a motion, authorizes the court to set aside a judgment at any time within five years, for an error of fact that came within the scope of the writ as it existed at common law. *** The statutory motion does not apply to cases in chancery. *** The proper method of impeaching and setting aside a decree after the term is to file an original bill in the nature of a bill of review, when such decree may be set aside, reversed or modified, according to the equities of the parties." On June 4, 1941, a rehearing was denied in the Frank case.

The judgment order of the Superior Court of Cook County of May 29, 1939, is affirmed.

JUDGMENT ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

41800

JOHN DEIR, BERNARD J. McDONNELL,
PAUL V. JOYCE, CLARENCE C. SAELHOF,
O. RICHTER, WILBER E. POST and
HAROLD C. VORIS,
(Plaintiffs) Appellees,

v.

THE RETIREMENT BOARD OF THE
MUNICIPAL EMPLOYEES' ANNUITY AND
BENEFIT FUND OF CHICAGO and
CATHERINE McDONNELL BRAUN,
Defendants.

INTERLOCUTORY

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

3111.A.369

CATHERINE McDONNELL BRAUN,
(Defendant) Appellant.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An appeal by Catherine McDonnell Braun, defendant, from an interlocutory order granting a temporary injunction against defendants, and also from a further order denying motion of said Braun to dissolve the injunctional order.

The verified complaint alleges, in substance, that Michael A. McDonnell, an employee of the City of Chicago, died January 21, 1941; that he had been a member of and a regular contributor to the Municipal Employees' Annuity and Benefit Fund (Ch. 24, Sec. 1044-1107, Ill. Rev. Stat. 1939); that from January 11, 1941, until his death McDonnell had been hospitalized at the Washington Boulevard Hospital and plaintiffs either expended or contracted to pay for doctors' services and other expenses; that upon McDonnell's death Deir, plaintiff, expended certain sums for the funeral and burial of McDonnell; that deceased left no property except the asset represented by his contributions to said benefit fund; that no letters had been issued or applied for in the Probate court; that McDonnell had been divorced from his wife and left no widow; that he left one child, Catherine McDonnell Braun, defendant, a married woman, who was not dependent upon deceased. The complaint further alleges that on February 21, 1941, The

JOHN DEIR, BERNARD J. McDONNELL,
PAUL V. JOYCE, CLARENCE C. GARDNER,
O. RICHMOND, WILLIAM H. POST and
HAROLD C. VOHSE,
(Plaintiffs)
vs.
THE RETIREMENT BOARD OF THE
MUNICIPAL EMPLOYEES' ANNUITY AND
BENEFIT FUND OF CHICAGO and
CATHERINE McDONNELL BEAUM,
(Defendants).

CATHERINE McDONNELL BEAUM,
(Defendant)
vs.
Plaintiff.

MR. JUSTICE SCAMMAN D LIVERED THE OPINION OF THE COURT.

An appeal by Catherine McDonnell from defendant, from an interlocutory order granting a temporary injunction against defendants, and also from a further order denying motion of said Brann to dissolve the injunctive order.

The verified complaint alleges, in substance, that Michael A. McDonnell, an employee of the City of Chicago, died January 21, 1941; that he had been a member of and a regular contributor to the Municipal Employees' Annuity and Benefit Fund (Ch. 24, Sec. 1044-1107, Ill. Rev. Stat. 1939); that from January 11, 1941, until his death McDonnell had been hospitalized at the Washington Boulevard Hospital and plaintiffs either expended or contracted to pay for doctors' services and other expenses; that upon McDonnell's death Deir, plaintiff, expended certain sums for the funeral and burial of McDonnell; that deceased left no property except the asset represented by his contributions to said benefit fund; that no letters had been issued or applied for in the Probate court; that McDonnell had been divorced from his wife and left no widow; that he left one child, Catherine McDonnell Brann, defendant, a married woman, who was not dependent upon deceased. The complaint further alleges that on February 21, 1941, The

INTERCOMPTORY
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

81114.808

Retirement Board of the Municipal Employees' Annuity and Benefit Fund of Chicago, defendant, after a hearing on the application of said defendant Braun for a refund of the contributions made by the deceased to the fund, ordered said refund paid to said Braun as the daughter of the deceased; that she openly denied any obligation to pay plaintiffs, and has stated that she would not pay them out of said refund, although requested to do so; that plaintiffs relied on this fund for payment and that said defendant, if permitted to receive the fund, would place it beyond their reach; that said funds were not exempt from attachment, garnishment, or other legal or equitable process. The complaint alleges that the statutes should be construed "so that persons who render emergency aid and medical service and burial to an employee contributor to the said Municipal Employees' Annuity and Benefit Fund of Chicago may look to any refunds due from said fund for the payment of their reasonable charges made on behalf of said contributor employee during his last hours of last illness and for the expenses of decent burial, in the absence of the rights of minors under said section; * * * that in equity and good conscience the said Catherine McDonnell Braun should not be permitted to receive and dispose of said funds now held by the said Municipal Employees' Annuity and Benefit Fund of Chicago to the prejudice of the lawful claims of these plaintiffs; that in equity and good conscience the People's Writ of Injunction should issue forthwith * * * to restrain the Retirement Board * * * from paying over to the defendant, Catherine McDonnell Braun, any re-funds or moneys representing the contributions made by the deceased * * * to said fund during his lifetime until the claims of these plaintiffs have been considered and adjudicated by this court; that unless said injunction issue the rights of these plaintiffs will be irreparably damaged and irreparable injury will be occasioned to said plaintiffs thereby; that unless said injunction is issued without notice to the defendants that there may be occasioned an advancement of the date of payment upon the afore-

Retirement Board of the Municipal Employees' Annuity and Benefit Fund of Chicago, defendant, after a hearing on the application of said defendant for a return of the contributions made by the deceased to the fund, ordered said return paid to said Brown as the daughter of the deceased; that she openly denied any obligation to pay plaintiffs, and has stated that she would not pay them out of said return, although requested to do so; that plaintiffs relied on this fund for payment and that said defendant, if permitted to receive the fund, would place it beyond their reach; that said fund were not exempt from attachment, garnishment, or other legal or equitable process. The complaint alleges that the statutes should be construed "so that persons who render emergency aid and medical service and burial to an employee contributor to the said Municipal Employees' Annuity and Benefit Fund of Chicago may look to any returns due from said fund for the payment of their reasonable charges made on behalf of said contributor employee during his last hours of last illness and for the expenses of decent burial, in the absence of the rights of minors under said section; * * * that in equity and good conscience the said Catherine McDermott Brown should not be permitted to receive and dispose of said funds now held by the said Municipal Employees' Annuity and Benefit Fund of Chicago to the prejudice of the lawful claims of these plaintiffs; that in equity and good conscience the People's Fund of Insurance should issue forthwith * * * to restrain the defendant from * * * from paying over to the defendant, Catherine McDermott Brown, any funds or moneys representing the contributions made by the deceased * * * to said fund during his lifetime until the claims of these plaintiffs have been considered and adjudicated by this court that unless said injunction issue the rights of these plaintiffs will be irreparably damaged and irreparable injury will be occasioned to said plaintiffs thereby; and unless said injunction is issued without notice to the defendants that they may be

mentioned application of Catherine McDonnell Braun by said Retirement Board * * * which would render any injunction issued * * * of no force and effect; that until a hearing and adjudication of the rights of these plaintiffs before this court no injury will be occasioned to the defendants herein * * *." The complaint prayed that an injunction issue against both defendants; "that the refund held by The Retirement Board * * * be declared chargeable with the payment of plaintiffs' claims as proven by plaintiffs, and that defendants herein may be ordered and directed to pay to plaintiffs from said moneys so held by said Retirement Board * * * the amounts found to be due to each of the plaintiffs herein, and upon failure or refusal of the defendant, Catherine McDonnell Braun, to comply with any of the terms of any decree hereinafter to be entered herein that a Special Commissioner be appointed by this Court to carry out the directions and orders of this court in the premises; and that these plaintiffs may have such other and further relief in the premises as equity may require and to the court shall seem meet." Attached to the complaint and made a part thereof is a statement of the items that went to make up the claims. Plaintiffs later filed a verified supplemental complaint that alleges: "That although more than sixty days have elapsed since the death of Michael A. McDonnell, the defendant, Catherine McDonnell Braun has omitted and neglected to open an estate for the said Michael A. McDonnell in the Probate Court of Cook County; that in the absence of said estate being opened by the said Catherine McDonnell Braun it was necessary for Annie McDonnell, mother of the deceased, to execute and file her petition for Letters in the said Probate Court of Cook County on March 28, 1941, which was, in fact, done and heirship proved on that day; that the court set April 28, 1941, as the date for the hearing upon the petition of the said Annie McDonnell for Letters of Administration; that it is impossible for the plaintiffs herein to have their claims adjudicated against the Estate of Michael A. McDonnell until after the appointment of

mentioned application of the doctrine of estoppel is hereby denied.
Retirement Board * * * which would render any injunction issued
* * * of no force and effect; that until a hearing and adjudication
of the rights of these plaintiffs before this court no injury will
be occasioned to the defendants herein. * * *. The complaint
prayed that an injunction issue against both defendants; "that
the return held by The Retirement Board * * * be declared charges
with the payment of plaintiffs' claims as proven by plaintiffs, and
that defendants herein may be ordered and directed to pay to plaintiffs
the sums from said moneys so held by said Retirement Board * * * the
amounts found to be due to each of the plaintiffs herein, and upon
failure or refusal of the defendant, Catherine McDonnell Braun, to
comply with any of the terms of any decree hereafter to be entered
herein that a Special Commissioner be appointed by this Court to
carry out the directions and orders of this court in the premises;
and that these plaintiffs may have such other and further relief
in the premises as equity may require and to the court shall seem
meet." Attached to the complaint and made a part thereof is a
statement of the items that ent to make up the claims. Plaintiffs
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has omitted and neglected to open an estate for the said Michael
A. McDonnell in the Probate Court of Cook County; that in the
absence of said estate being opened by the said Catherine McDonnell
Braun it was necessary for Anne McDonnell, mother of the deceased
to execute and file her petition for letters in the said Probate
Court of Cook County on March 28, 1941, which was, in fact, done
and her petition proved on that day; that the court set April 28, 1941
as the date for the hearing upon the petition of the said Anne
McDonnell for letters of administration; that it is impossible for
the plaintiffs herein to have their claims adjudicated against
the Estate of Michael A. McDonnell until after the appointment of

a legal representative by the Probate Court; that therefore your petitioners pray that this court take jurisdiction of the subject matter of plaintiffs' claims to the end that there will be avoided a multiplicity of suits, and that after an adjudication of the reasonableness of the claims of the plaintiffs herein that the refund heretofore restrained from being paid to the defendant, Catherine McDonnell Braun, may be held to be chargeable with the payment of plaintiffs' claims as in the prayer of the complaint more specifically set forth."

The Retirement Board filed an answer that avers, in substance, that it has no interest in the litigation other than as trustee of the moneys in question, and denies that the Act in question is unconstitutional in any respect or in any of its provisions.

The Retirement Board has not appealed from the interlocutory order.

The defendant Braun's motion to dissolve the temporary injunction alleges that the complaint is without equity on its face; that Section 1082(e) is not subject to the interpretation sought by plaintiffs; that plaintiffs are not proper parties to the complaint for the reason that the cause of action, if any, belongs to the administratrix of the estate of McDonnell, deceased; that if plaintiffs' allegation that the refund is not exempt from attachment, garnishment, or other legal process, is sound, then plaintiffs have an adequate remedy at law.

Defendant Braun contends that "the court was without jurisdiction to enter the injunction herein because the action of the Board in awarding defendant the refund is subject to review by certiorari only." This point was not raised in defendant Braun's motion to dissolve the injunction. However, there is no merit in it. The instant suit does not challenge the legality or propriety of the Retirement Board's order. Plaintiffs seek to reach the amount of the refund allocated to the daughter of the

a legal representative by the Probate Court; that therefore your petitioners pray that this Court take jurisdiction of the subject matter of plaintiffs' claims to the end that there will be avoided a multiplicity of suits, and that after an adjudication of the reasonableness of the claims of the plaintiffs herein that the refund heretofore retained from being paid to the defendant, Catherine McDonnell Brown, may be held to be chargeable with the payment of plaintiffs' claims as in the prayer of the complaint more specifically set forth."

The Retirement Board filed an answer that avers, in substance, that it has no interest in the litigation other than as trustee of the moneys in question, and denies that the act in question is unconstitutional in any respect or in any of its provisions.

The Retirement Board has not appealed from the interlocutory order.

The defendant Brown's motion to dissolve the temporary injunction alleges that the complaint is without equity on its face; that Section 1082(e) is not subject to the interpretation sought by plaintiffs; that plaintiffs are not proper parties to the complaint for the reason that the cause of action, if any, belongs to the administratrix of the estate of McDonnell, deceased; that if plaintiffs' allegation that the fund is not exempt from attachment, garnishment, or other legal process, is sound, then plaintiffs have an adequate remedy at law.

Defendant Brown contends that "the court was without jurisdiction to enter the injunction herein because the action of the Board in awarding defendant the fund is subject to review by certiorari only." This point was not raised in defendant Brown's motion to dissolve the injunction. However, there is no merit in it. The instant suit does not challenge the legality or propriety of the Retirement Board's order. Plaintiffs seek to

deceased, defendant Braun.

Defendant Braun contends that "this action is not brought by the proper party, the administrator of the estate of deceased, nor have the persons here, plaintiffs, established their claims against the estate of Michael A. McDonnell;" that "the fact that letters of administration were not applied for is immaterial as plaintiffs could have applied." There is no merit in this contention. Neither plaintiffs nor defendant Braun contend that the estate of the deceased was entitled to the refund as an asset of the estate. The motion to dismiss the injunction is based upon the theory, to use the words of her attorney in her brief, that "this money belongs to defendant, Catherine McDonnell Braun," and defendant argues that "the defendant Catherine McDonnell Braun is entitled to a trial by jury before her property can be touched."

Defendant Braun contends that "the law is well settled that a motion to dissolve a temporary injunction on the ground that there is no equity on the face of the complaint operates as a demurrer to (or motion to strike) the complaint," and argues that it appears from plaintiffs' complaint that they cannot have the relief prayed for and therefore they were not entitled to a temporary injunction. Plaintiffs argue that "equity will raise a trust by construction where the conduct of a refund applicant is attended with moral fraud, is repugnant to equity and good conscience, and is contrary to public policy." It is conceded that this is a case of first impression. In Lee v. Hansberry, 291 Ill. App. 517, the First Division of this court, speaking through Mr. Presiding Justice O'Connor, said (pp. 521, 522):

"Defendants contend that the complaint fails to state a cause of action because it fails to allege the restrictive agreement was signed by the owners of 95 per cent of the frontage of the property in the restricted area and that by the terms of the restrictive agreement it was not to become effective unless signed by the persons owning 95 per cent of the frontage. The agreement

deceased, defendant Brown.

Defendant Brown contends that "this action is not brought by the proper party, the administrator of the estate of deceased, nor have the persons here, plaintiffs, established their claim against the estate of Michael A. McDonnell;" that "the fact that letters of administration were not applied for is immaterial as plaintiffs could have applied." There is no merit in this contention. Neither plaintiffs nor defendant Brown contend that the estate of the deceased was entitled to the return as an asset of the estate. The motion to dismiss the injunction is based upon the theory, to use the words of her attorney in her brief, that "this money belongs to defendant, Catherine McDonnell Brown," and defendant argues that "the defendant Catherine McDonnell Brown is entitled to a trial by jury before her property can be touched."

Defendant Brown contends that "the law is well settled that a motion to dissolve a temporary injunction on the ground that there is no equity on the face of the complaint operates as a demurrer to (or motion to strike) the complaint," and argues that it appears from plaintiffs' complaint that they cannot have the relief prayed for and therefore they were not entitled to a temporary injunction. Plaintiffs argue that "equity will raise a trust by construction where the conduct of a third applicant is attended with moral fraud, is repugnant to equity and good conscience, and is contrary to public policy." It is contended that this is a case of first impression. In De V. Macpherson, 201 Ill. App. 517, the first division of this court, speaking through Mr. Presiding Justice O'Connor, said (pp. 521, 522):

"Defendants contend that the complaint fails to state a cause of action because it fails to allege the restrictive agreement was signed by the owners of 99 per cent of the proceeds of the property in the restricted area and that by the terms of the restrictive agreement it was not to become effective unless signed

provides that it shall not be effective unless 'signed by the owners * * * of ninety-five per centum of the frontage above described.' The allegation of the complaint is that 'ninety-five per centum of the owners of the frontage above described' have signed the agreement. We think the objection is hypercritical, but in any event, even if the complaint were subject to the special demurrer or motion to strike on this ground, that would not warrant us in disturbing the order appealed from. McDougall Co. v. Woods, 247 Ill. App. 170; Friedman v. Peckler, 255 Ill. App. 199; Levy v. Rosen, 258 Ill. App. 262; Lincoln Trust & Savings Bank v. Nelson, 261 Ill. App. 370; Mayer v. Collins, 263 Ill. App. 219; DeKalb Trust & Savings Bank v. DePaul Ed. Aid Society, 278 Ill. App. 102.

"In the McDougall case, which was an appeal from an interlocutory order appointing a receiver and granting a temporary injunction, we said (p. 172): 'In appeals from interlocutory orders it is not our province to determine the rights of the parties in the subject matter of the litigation, but simply to determine from the averments of the bill whether the party probably is entitled to the relief sought'; that where such order was improperly granted without notice where notice was required, or where the statute required a bond as a condition precedent and none had been given, the order will be reversed without reference to the merits of the cause. And continuing we said (p. 174): 'We do not feel called upon to pass upon the demurrability of the bill or the merits of the cause. It is enough to say at present that the bill presents circumstances which lead to a belief that probably the plaintiff will be entitled to relief.' This holding was followed in each of the cases above cited." In Friedman v. Peckler, supra, the Third Division of this court, speaking through Mr. Presiding Justice Wilson, quotes with approval the ruling in McDougall Co. v. Woods, supra, and states (pp. 204, 205):

"The trial court is not required to examine minutely the

provides that it shall not be effective until it is signed by the owners * * * of ninety-five per centum of the frontage above described.' The allegation of the complaint is that 'ninety-five per centum of the owners of the frontage above described' have signed the agreement. We think the objection is hypothetical, but in any event, even if the complaint were subject to the special demurrer or motion to strike on this ground, that would not warrant us in disturbing the order appealed from. McDonald v. Co. v. Woods, 247 Ill. 111, 170; Friedman v. Beckler, 252 Ill. App. 199; Levy v. Rosen, 256 Ill. App. 208; Latrobe Trust & Savings Bank v. Nelson, 261 Ill. App. 370; Levy v. Collins, 263 Ill. App. 219; DeKalb Trust & Savings Bank v. DeKalb B. & S. Society, 273 Ill. App. 102.

"In the McDonald case, which was an appeal from an interlocutory order appointing a receiver and granting a temporary injunction, we said (p. 172): 'In appeals from interlocutory orders it is not our province to determine the rights of the parties in the subject matter of the litigation, but simply to ascertain from the averments of the bill whether the party probably is entitled to the relief sought; that where such order or temporary injunction is granted without notice where notice was required, or where the notice required a bond as a condition precedent and none had been given, the order will be reversed without reference to the merits of the cause, and continuing we said (p. 174): 'We do not feel called upon to pass upon the demurrability of the bill or the merits of the cause. It is enough to say at present that the bill presents circumstances which lead to a belief that probably the plaintiff will be entitled to relief.' This holding was followed in each of the cases above cited." In Friedman v. Beckler, supra, the First Division of this court, speaking through Mr. Presiding Justice Wilson, notes with approval the ruling in McDonald v. Co. v. Woods, supra, and states (pp. 204, 205):

bill of complaint prior to the entry of an interlocutory decree for an injunction, as the entry of such order is justly within the discretion of that court, if, in its opinion, it is necessary to hold the matters in statu quo until a more complete bearing can be had upon the bill. Courts of review are not inclined to interfere with this discretion, where it appears that the requirements of the statute on the granting of such interlocutory orders have been complied with by the giving of notice and bond on the part of the complainant.

"High on Injunctions, vol. 2, 4th Ed., sec. 1696, says:

"Sec. 1696. Appellate courts averse to interfering with action of court below; exception to rule. It is, however, worthy of note that even in those states where the right of appeal is recognized from an order of a court of original jurisdiction granting or refusing an interlocutory injunction, courts of review or of appellate jurisdiction interfere with extreme reluctance with the action of the inferior court. Treating the power of granting interlocutory injunctions as resting in a sound judicial discretion, the courts of appellate jurisdiction are averse to any interference with the exercise of that discretion. And to such an extent is this aversion manifest, that it may be stated as a general rule prevailing in states where appeals are allowed from orders granting or refusing injunctions in limine, that the appellate or revisory tribunal will not interfere with or control the action of the court below in such matters unless it has been guilty of a clear abuse of that discretion; and by abuse of discretion within the meaning of the rule is meant an error in law committed by the court. * * *

"From a reading of the amended and supplemental bill, it is apparent that the circuit court has jurisdiction of the subject-matter, namely, a trust, if it is a trust, and further that the court has jurisdiction of the parties. It is not within the province of this court on this appeal to consider the merits of the contro-

bill of complaint prior to the entry of an interlocutory decree for an injunction, as the entry of such order is final within the discretion of that court, if, in its opinion, it is necessary to hold the matters in dispute until a more complete hearing can be had upon the bill. Courts of review are not inclined to interfere with this discretion, where it appears that the requirements of the statute on the granting of such interlocutory orders have been complied with by the giving of notice and bond on the part of the complainant.

"High on Injunctions, vol. 2, 4th Ed., sec. 1096, says: "Sec. 1096. Appellate courts averse to interfering with action of court below; exception to rule. It is, however, worthy of note that even in those states where the right of appeal is recognized from an order of a court of original jurisdiction granting or refusing an interlocutory injunction, courts of review or of appellate jurisdiction interfere with extreme reluctance with the action of the inferior court. Treating the power of granting interlocutory injunctions as resting in a sound judicial discretion, the courts of appellate jurisdiction are averse to any interference with the exercise of that discretion, and to such an extent is this aversion manifested, that it may be said that a general rule prevailing in states where appeals are allowed from orders granting or refusing injunctions is that, that the appellate or revisionary tribunal will not interfere with or control the action of the court below in such matters unless it has been fully or a clear abuse of that discretion; and by abuse of discretion within the meaning of the rule is meant an error in law committed by the court. * * *

"From a reading of the amended and supplemental bill, it is apparent that the circuit court has jurisdiction of the subject-matter, namely, a trust, as it is a trust, and further that the court has jurisdiction of the parties. It is now within the province of this court on this appeal to consider the merits of the controversy.

versy between the parties in order to express an opinion as to its probable outcome. Upon the hearing on the demurrers, general and special, filed herein by the defendant, a proper occasion will arise upon which the matter can be presented to this court for full consideration, if the defendant so desires." Other cases to the same effect might be cited if it were necessary.

The foregoing cases, in our opinion, are specially applicable to the instant case, one of first impression. Defendant Braun suffered no substantial harm by the issuance of the temporary injunction.

It is apparent, from her attitude, that she does not propose to willingly pay a dollar of the amounts paid or incurred by plaintiffs, growing out of the last illness of the deceased and the expenses of his burial; and it is clear from her attitude that if the temporary injunction were dissolved she would obtain the refund moneys and place the same beyond the power of plaintiffs to reach by legal process. Her attitude toward the claims of plaintiffs shocks one's sense of justice. We are strongly of the opinion that the status quo should be maintained until the final disposition of the cause. In the meantime, defendant Braun's conscience, now slumbering, may awaken, and she may treat the claims of plaintiffs in an equitable way.

The interlocutory injunctional order of the Superior court of Cook county is affirmed.

INTERLOCUTORY INJUNCTIONAL ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

very between the parties in order to express an opinion as to its probable outcome. Upon the hearing of the demurrers, general and special, filed herein by the defendant, a proper occasion will arise upon which the matter can be presented to this court for full consideration, if the defendant so desires." Other cases to the same effect might be cited if it were necessary.

The foregoing cases, in our opinion, are specially applicable to the instant case, one of first impression. Defendant Brian suffered no substantial harm by the issuance of the temporary injunction. It is apparent, from her attitude, that she does not propose to willingly pay a dollar of the amounts paid or incurred by plaintiff, growing out of the last illness of the deceased, and the expenses of his burial; and it is clear from her attitude that if the temporary injunction were dissolved she would obtain the refund moneys and place the same beyond the power of plaintiff to reach by legal process. Her attitude toward the claims of plaintiff shocks one's sense of justice. We are strongly of the opinion that the status quo should be maintained until the final disposition of the cause. In the meantime, defendant Brian's conscience, now slumbering, may awaken, and she may treat the claims of plaintiff in an equitable way.

The interlocutory injunctive order of the Superior

court of Cook county is affirmed.

INTERLOCUTORY INJUNCTIVE ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

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tract

General Number 9251.

Agenda number 5.

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT
APRIL TERM, A. D. 1941.

311 Ill. App.
Adv. P. & B.
11-1-41

ROBERT BALL, by Charles Ball, :
his father and next friend, :

Plaintiff-Appellee, :

-vs- :

SMITH HAINNEY, Defendant, and :
REATHA HAINNEY, :

Defendant-Appellant. :

SMITH HAINNEY, Cross Plaintiff, :
Appellant, :

-vs- :

ROBERT BALL, Cross Defendant, :
Appellee. :

APPEAL FROM THE CIRCUIT COURT
OF PIATT COUNTY.

311 I.A. 540

~~HONORABLE F. B. LEONARD~~

~~HONORABLE W. C. BODMAN,~~

~~Judges Presiding.~~

HAYES, J.:

The defendant, Reatha Hainney, appeals from a judgment rendered against her in the Circuit Court in favor of the plaintiff-appellee, Robert Ball. The suit was started in a Justice of the Peace Court, for damages sustained in a collision between a car driven by the plaintiff and one driven by the defendant. The car driven by the defendant was owned by her husband Smith Hainney, who was not with her at the time of the collision, and he filed and prosecuted a Counterclaim against Robert Ball for damages sustained by his car in the collision.

Before the Justice of the Peace, the jury found the issues in favor of the defendants. No judgment of any kind was entered on

the verdict. An appeal was taken to the Circuit Court. The record of that court shows the first Order to be the setting of the case for trial by agreement. After this Order was entered, the defendants entered a limited appearance and moved to set aside and vacate the Order already entered, setting the case for trial. In support of said motion, defendants filed an affidavit which set forth; that on December 9, 1939 counsel for plaintiff made a motion to have the cause set for trial in open court without any notice to the Attorneys for the defendant; that at the time the motion was called up before the court the senior member of the law firm, representing the defendants as attorneys, was not present; that the junior member stated to the court that they could not be ready for trial on the date contemplated; that they did not consent to the Order; that the junior member was entirely unfamiliar with the case and remained silent when the Order was entered; that the Order setting the case was entered before the defendants had entered their appearance, and that the appeal should be dismissed for the reason that no judgment had been entered before the Justice of the Peace.

There must be an entry of some kind of a judgment by the Justice of the Peace before there can be an appeal taken to the Circuit Court. Ill. Rev. Stat., Chap. 79, Para. 116, Sec. 1. The authority for taking appeals from justices of the peace to higher courts is purely statutory and can be executed only in the manner prescribed by the statute. The statute only provides that appeals may be taken from judgments rendered by justices and not from verdicts of juries in cases tried before them. *Church v. Stunkard*, 101 Ill. App. 148; *Conant v. Watts*, 196 Ill. App. 569.

In the case of *Hogue v. King*, 245 Ill. App. 314, this court said, "It is true no formal words are required of a justice of the peace in entering judgment, but it is necessary that some kind of a judgment be entered; otherwise there is nothing to appeal

from and the court appealed to acquires no jurisdiction of the case. Had appellants proceeded to trial under a general appearance and without any motion to dismiss, they would not now be in position to raise this question, but their limited entry of appearance and motion to dismiss saved this question for review by this court."

In the case of Demilly v. Grosrenaud, 201 Ill. 272; no transcript was furnished on appeal from the justice of the peace to the circuit court. Objection was made by the defendant as to the jurisdiction of the court for want of transcript. The court proceeded to trial, and there was a verdict in favor of the plaintiff. The statute requires that a transcript of the justice's docket be filed with the clerk of the court to which the appeal is taken. Our Supreme Court in that opinion stated, "Proceedings in the Circuit Court are based on the transcript, and it has uniformly been held that without a transcript of the proceedings before the justice, the circuit court has no jurisdiction of the subject matter. The law conferring jurisdiction on the circuit court provides for the transfer of the cause to that court, and when an appeal has been taken the court may obtain jurisdiction of the subject matter by requiring a transcript to be filed, but until that is done it will have no jurisdiction to try the cause. The circuit court was wanting in jurisdiction of the subject matter, and that was an objection which could not be waived. As a matter of fact, the objection to the jurisdiction was made when the case was called for trial. The judgment being an absolute nullity, all proceedings under it were voided."

A similar situation is presented in the case now before us. The statute requires the entry of a judgment by the justice of the peace, before there can be an appeal. The objection was raised in the Circuit Court before trial, by a motion to dismiss the appeal for want of jurisdiction, which motion should have been allowed by

the circuit court.

The judgment of the Circuit Court is reversed and cause remanded to that Court with directions to dismiss the appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

act

General Number 9282.

Agenda number 2.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

APRIL TERM, A. D. 1941.

LENA ROBERTS,

Appellant,

-vs-

HIRAM A. LANE, Executor
of the Estate of Charles
P. Mundy, Deceased,

Appellee.

APPEAL FROM THE CIRCUIT COURT

OF VERMILION COUNTY.

311 I.A. 541¹

~~HONORABLE BEN F. ANDERSON,~~

~~Judge Presiding.~~

HAYES, J. :

This is an appeal from a judgment of the Circuit Court, based on the verdict of a jury, giving the plaintiff \$11.50 on a claim she had filed in the Probate Court, for 466 day's work at the rate of \$2.00 per day, for nursing the wife of Charles P. Mundy, covering a period of five years,--during all of which time Mrs. Mundy was a helpless invalid.

The plaintiff, Lena Roberts, was a sister of Mrs. Mundy, and lived close to the Mundy home. The plaintiff based her claim on an express agreement with Mr. Mundy whereby he agreed to pay her for her services. Mrs. Mundy died February 28, 1938. Mr. Mundy died a little over a year after the death of Mrs. Mundy. The claim was filed against the estate of Charles P. Mundy on June 2, 1939. The defense claims, that the services consisted of voluntary aid given at the time of Mrs. Robert's visits to her sister Mrs. Mundy, which do not constitute an employment; that the proofs failed to show an express contract, and that a settlement was made between

100-100000

100-100000

IN THE MATTER OF

THE ESTATE OF

JOHN J. HARRIS

DECEASED

VS.

JOHN J. HARRIS

VS.

JOHN J. HARRIS

-VS-

JOHN J. HARRIS, DECEASED
BY HIS ESTATE, PLAINTIFF
VS.
JOHN J. HARRIS, DEFENDANT

JOHN J. HARRIS

JOHN J. HARRIS

This is an appeal from a judgment of the Circuit Court of the United States for the District of Columbia, entered on the 10th day of June, 1934, in the above entitled cause, wherein the plaintiff, John J. Harris, deceased, by his estate, brought an action against the defendant, John J. Harris, for the recovery of the sum of \$100,000.00, and for costs. The plaintiff's claim is based on the will of the deceased, John J. Harris, which was executed on the 10th day of June, 1934, and which provided that the sum of \$100,000.00 should be paid to the plaintiff, John J. Harris, deceased, by the defendant, John J. Harris, after the death of the deceased, John J. Harris. The defendant, John J. Harris, has failed to pay the sum of \$100,000.00 to the plaintiff, John J. Harris, deceased, by the defendant, John J. Harris, after the death of the deceased, John J. Harris. The plaintiff, John J. Harris, deceased, by his estate, has brought this action against the defendant, John J. Harris, for the recovery of the sum of \$100,000.00, and for costs.

The plaintiff, John J. Harris, deceased, by his estate, has brought this action against the defendant, John J. Harris, for the recovery of the sum of \$100,000.00, and for costs. The plaintiff's claim is based on the will of the deceased, John J. Harris, which was executed on the 10th day of June, 1934, and which provided that the sum of \$100,000.00 should be paid to the plaintiff, John J. Harris, deceased, by the defendant, John J. Harris, after the death of the deceased, John J. Harris. The defendant, John J. Harris, has failed to pay the sum of \$100,000.00 to the plaintiff, John J. Harris, deceased, by the defendant, John J. Harris, after the death of the deceased, John J. Harris. The plaintiff, John J. Harris, deceased, by his estate, has brought this action against the defendant, John J. Harris, for the recovery of the sum of \$100,000.00, and for costs.

Mrs. Mundy and the plaintiff, after the death of Mrs. Mundy, by giving the household furniture to her. Several witnesses testified to declarations made by Mr. Mundy during his lifetime,--in effect that Mrs. Roberts was a great help in the care of his wife, and that he would see that she was taken care of. There were also several witnesses who testified to meeting one evening at the Mundy home, shortly after the death of Mrs. Mundy, and that while they were there, other people came to buy some of the articles of furniture. At this time, the plaintiff and Mr. Mundy were present, and Mr. Mundy inquired if Mrs. Roberts would be satisfied if she had her pick of the furniture for her services as compensation for all she had done for him, and that she replied that she would be more than satisfied.

The plaintiff attempted to meet the defendant's proof on the settlement, by stating first, that the conversation did not take place, and second, that if it did, it had reference to some small cash items she had paid out for Mr. Mundy being insurance, medicine, ~~and~~ etc. The evidence disclosed that Mr. Mundy's habits on family expenses were very prompt; that he usually paid them in cash; that he paid his own bills and had a fair bank balance, and that he kept the family expenses paid up.

Mr. Mundy died testate, leaving all his property to the defendant herein, Hiram Lane, a half brother.

Complaint is made on the admission and exclusion of evidence and on one instruction. Nothing is pointed out here, which is serious enough to cause reversible error. The evidence was conflicting on the issues raised, and was of a peculiar nature that should be settled by a jury,--they being in the sphere that is related to the domestic affairs of the family and the home, of which most jurors are thoroughly familiar, as well as the rivalries and contentions that go with different sets of relatives; and where old people die without any children and the collaterals on several sides

are grasping for the remaining assets.

The jury having decided the issues and fixed the damages at \$11.50, we are not inclined to interfere with their decision and the judgment of the Circuit Court of Vermilion County is hereby affirmed.

JUDGMENT AFFIRMED.

THE PROSECUTOR FOR THE DISTRICT OF COLUMBIA

The jury having returned the verdict that the defendant
is guilty of the crime of kidnapping, the court at 11:15 a.m.
and the judgment of the United States District Court is
affirmed.

WILLIAM H. HARRIS

8-12
M.H.

Abstract

55a

V. NO. 9600

AGENDA NO. 23

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1940

311 I.A. 541²

CLARENCE ROSENE,

Appellant

v.

FRODDA MARIE ROSENE,
Administratrix of the
Estate of Nels O. Rosene,
deceased,

Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
WHITESIDE COUNTY.

DOVE, J.

Nels O. Rosene died on October 25, 1937 and at the time of his death and for thirty-four years prior thereto he had lived, as a tenant farmer, on a farm of 320 acres in Whiteside County, Illinois. He left a son, Clarence Rosene, and a daughter Frodda Marie Rosene who was duly appointed administratrix of his estate.

On October 11, 1938 the son, Clarence, filed a claim aggregating \$1266.00, against his father's estate for wages due him for labor on the farm for the years 1933 to 1937 inclusive. The amount he claimed to be

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

111 A. 541

October Term, A. D. 1930

APPELLANT
APPELLATE COURT OF
ILLINOIS

Appellant

v.

AN MARIE ROSEN,
Administratrix of the
Estate of Nels O. Rosen,
deceased,

Appellee.

COVE, J.

Nels O. Rosen died on October 11, 1927 and at the time of
his death and for thirty-two years prior thereto was and lived as
tenant farmer, on a farm of 160 acres in Will County, Illinois.
He left a son, Clarence Rosen, and a daughter, Emma Rosen, who
was duly appointed administratrix of his estate.

On October 11, 1928 the son, Clarence, filed a bill in equity
in the Circuit Court of Will County against his father's estate for
partition of the farm for the years 1927 to 1928 inclusive. The account claimed by the

due him for 1933 was \$375.00, for 1934 \$275.00, for 1935 \$216.00 and for 1936 and 1937, each year \$200.00. Certain creditors of the deceased filed objections thereto and the record recites that upon the hearing in the county court the claimant offered no evidence in support of his claim and it was disallowed. Upon appeal to the circuit court, an appearance was entered by attorneys for six named creditors in opposition to the claim and a hearing had before the court and jury. At the close of claimant's evidence the court directed a verdict for the defendant and the court, after denying a motion for a judgment non obstante verdicto, rendered judgment on the verdict. Subsequently, a motion for a new trial was denied and the claimant appeals.

Appellant filed in this court a motion to strike the brief and argument for the objecting creditors, which motion was taken with the case. Section 25 of the Civil Practice Act (Ill. Rev. Stat. 1939, chap. 110, par. 149) provides: "Where a person not a party, has an interest or title which the judgment may affect, the court on application shall direct him to be made a party." The Probate Act, Sec. 348 Chap. 3, Par. 196, Ill. Rev. St. 1939) provides that "The executor, administrator, guardian or conservator or any other person whose rights may be effected by the allowance of a claim may file pleadings with the clerk of the court." In the instant case the claim of appellant is of the third class. It seems to be agreed that the estate is insufficient to pay it and the claims of the other creditors in full. While it does not appear that the provisions of the statute were formally followed, the objecting creditors entered their appearance, and participated in the trial without any objection by appellant, and were served with copies of the abstract and briefs on this appeal. It is an almost universal rule at law as well as in equity that a court may allow other persons than those before the court to come in as parties, to the end that substantial justice may be done. (Grewenig v. American Baking Co., 293

Ill. App. 604.) The record shows the objecting creditors were treated in the trial court as parties, both by the court and by appellant. The quoted portion of the statute requires the court to grant applications of interested parties to be made parties, but it does not purport to prohibit persons not formal parties from participating in the proceedings. Under these circumstances the motion to strike the brief and argument of the objecting creditors is denied.

The administratrix, a daughter of the decedent, who lived with him, was called as an adverse witness under the provisions of section 60 of the Civil Practice act. She testified ~~that~~ that decedent was a tenant farmer of 320 acres from 1903 until his death; that appellant lived on the farm all that time except during the farm year of 1924-1925 when he lived in the nearby village of Tampico; that he did the labor of a farm hand from 1903 until his father's death; that in December, 1924, the decedent contracted with appellant to pay him \$575.00 per annum for his work; that in 1930 the payments were reduced to \$540.00 per year and were to be credited with the proceeds of ducks and geese raised and sold by appellant and that appellant had no interest in the other poultry raised on the farm.

The witness further testified that she was in charge and kept the books for her father; that her father never made any entries therein, and when he told her to put something down, she did so; that she posted the checks whenever they came in from the bank, about once a month, and wrote all the checks there were to write; that the book produced on the trial started in January 1929, carrying forward a balance due appellant as shown by another book; that the book produced contained all the transactions relating to the account of appellant, and embodied other transactions of her father with other people, covering practically all that took place on the farm; that the entries were made on their purported dates; that most of them were made at the time they should have been made, but once

in a while, maybe, some were carried over for a few months and then made; that her father had access to the book all the time, and looked at it and examined it; that she had conversations with him as to whether the account of appellant as shown by the books was correct. She was not permitted to state the conversations, and the pages of the book relating to appellant's account were denied admission in evidence.

The account of appellant in the book shows detailed amounts as to cash and checks paid appellant. The items for ducks and geese sold are charged in a lump sum each year. These latter amounts were taken from another book of detailed sales of poultry, in which appellant made entries. This book was not produced upon the trial or offered in evidence. The witness testified she knew the amounts in the book kept by her were correct; that if appellant sold ducks she knew the amount, because she saw the record, and helped pick, count and pack them, saw appellant put the entries in the book, sometimes saw the checks he received from people, and when he sold for cash she thought she would know if he failed to tell her about any ducks sold, because she knew how many he had and how many he took to town; that to her knowledge he told the truth about it. During her testimony she said that from her own knowledge, by refreshing her recollection from the book, she knew what the credit to appellant for poultry was during the five year period. She said the poultry credit was itemized in the other book, and her only knowledge was in looking at the book kept by her and seeing the totals copied from the other book. Appellee attaches much importance to this last statement, but considered with her own positive testimony as to her knowledge on the subject, it is obvious she merely meant to say that without referring to the other book her testimony must be confined to the entries in the book kept by

in a while, maybe, some were called over for a few minutes and some
that her father had access to the book all the time. And I asked her if she
examined it; that she had conversations with him as to whether the contents
of appellant as shown by the books was correct. She was not able to
state the conversations, and the pages of the book relating to appellant
account were denied admission in evidence.

The account of appellant in the book shows detailed information
as to cash and stocks paid appellant. The same for books and other
sold were charged in a lump sum each year. These latter amounts were taken
from another book of detailed sales of property. In which appellant was
interested. This book was not produced upon the trial or offered in evidence.
The witness testified she knew the entries in the book kept by her were
correct; that if appellant sold ducks she knew the amount, because she
saw the receipt, and helped pick, count and pack them, and testified that
the entries in the book, sometimes saw the ducks as received from country
and when he sold for cash she thought she would know it. As to the book kept
her about any ducks sold, because she knew how many he had and how many
he took to town; that to her knowledge he sold the ducks about the same
her testimony she said that from her own knowledge, by recollection
recollection from the book, she knew that the credit to appellant for
property was during the five year period. She said the country credit
was limited in the other book, but her only knowledge was in looking at
the book kept by her and seeing the entries taken from the other book.
Appellate attaches much importance to this fact, and she testified
with her own positive testimony as to her knowledge of the contents of
the books she merely meant to say that she was not willing to say that
book her testimony must be confined to what she saw in the book kept by

her.

By refreshing her recollection from the book kept ^{by} her, she testified to the amount of the poultry credit in each of the five years. The claim that she read the amounts from the book, instead of refreshing her recollection from it is without merit. The record shows the contrary is true. It is well settled that a witness may refresh his memory from writings. (Diamond Glue Company v. Wietzychowski, 227 Ill. 338.) She testified that the cash paid appellant, amounting to \$1600.77, was credited on unpaid wages due prior to 1933.

Appellee and the objecting creditors insist that inasmuch as the balance due each year, as shown by the book to be due appellant, was not carried forward into the next year's account, it cannot be regarded as a running account, and the balance due each year is presumed to be paid. The book shows the balance due each year. It was kept by an unskilled person and her testimony sufficiently shows that each balance is still unpaid.

Appellee and the objecting creditors invoke the familiar rule that a creditor cannot introduce his books in evidence except he prove they are books of original entry, made in the usual course of business, and are true and correct. The proofs show that the witness was in charge of her father's business, wrote his checks and kept his books, not only as to appellant's account, but as to practically every transaction of the farm business; that the entries were true and correct, and were made by her as directed by him; that he always had access to the book and examined it. These facts show the witness was the agent of decedent, and that her book-keeping was done in that capacity. The account of appellant by debits and credits, shows the amount due appellant each year. This is an admission against interest. The rule invoked by appellee and the objecting creditors does not apply to books of a defendant sought to be introduced by a plaintiff as an admission against interest. (Dows v. Naper, 91 Ill. 44; Cawley v. People, 95 id. 249; Adair v. Adair Printing Co., 162 Ill. App. 511; Second B. & I. Building Association v. Cochrane,

By reflecting her recollection from the book kept by her, she testified to the amount of the positive credit in each of the five years. The idea that she read the accounts from the book, instead of reflecting her recollection, is a logical one. The record shows the contrary is true. It is well settled that a witness may testify to a memory from writings. (Duncan v. County of Kings, 100 Cal. 111, 732.) She testified that the cash paid accounts, beginning at \$1500.77, was credited on regular notes and bills to 1905.

Appellee and the objecting creditors found that appellee as the balance due each year as shown in the book to be her deposits, was not carried forward into the next year's account, it should be required as a running account, and the balance due each year is necessary to be paid. The book shows the balance due each year. It was kept up as a running account and her testimony sufficiently shows that she was not

is still unpaid. Appellee and the objecting creditors found that appellee as the balance due each year as shown in the book to be her deposits, was not carried forward into the next year's account, it should be required as a running account, and the balance due each year is necessary to be paid. The book shows the balance due each year. It was kept up as a running account and her testimony sufficiently shows that she was not

103 id. 29; Wigmore on Evidence, (3d ed.) par. 1557 (2). Admissions of a decedent against interest are competent evidence on a trial of a claim against an estate. (Schell, Admr., v. Weaver, 225 Ill. 159.) Such admissions include not only book entries, but other statements of fact, verbal or written. (Hughes v. Eldorado C.&M. Co., 197 Ill. App. 259.) Under these holdings it was error to refuse to allow the pages of the book showing appellant's account to be admitted in evidence. If the account contains any entry not properly attributable to the contract between appellant and decedent and the claim filed, such items can be eliminated upon another trial.

The application of appellant's wife, and appellant's motion entered in the circuit court that she be made a party to this proceeding were accompanied by affidavits to the effect that she was a party to the contract with decedent; that as a part of the consideration for the wages agreed to be paid appellant she agreed with the decedent to help with the housework, and pursuant thereto did assist in such work; that she and appellant have four minor children and that the judgment will directly affect her interests. It will be noted that neither the application or motion alleges that she was to receive any pay for such services, but on the contrary show the payments were to be made to appellant. No fact is alleged which shows she has any interest in the subject matter which will be affected by the judgment, or that the contract to pay appellant only should not be carried out. The court did not err in denying her application to be made a party.

The judgment is reversed and the cause is remanded with directions to sustain appellant's motion for a new trial.

Reversed and remanded with directions.

102 11. 28; Wigmore on Evidence, (81 ed.) par. 1217 (2). Admissions as

a defendant against interest are competent evidence on a trial as a

claim against an estate. (Graham v. Sawyer, 205 Ill. 100.)

Such admissions include not only those which are made in the presence of

fact, verbal or written. (Harris v. Williams, 205 Ill. 100.)

239.) Under these holdings it was argued to be held to allow the cases

of the book showing appellant's account to be admitted in evidence. If

the account contains any entry not properly attributable to the defendant

between appellant and defendant and the claim filed, such entry can be

eliminated upon another trial.

The admission of appellant's wife, and appellant's

entered in the account does not show to have a right to this admission

were accompanied by admissions to the effect that she was a party to

the contract with defendant; that as a part of the consideration for the

debt agreed to be paid appellant was to be paid to the defendant to help

with the business, and pursuant thereto the money in such money, that

she and appellant have four minor children and that the husband will

directly affect her interests. It will be noted that although the

application or motion alleges that the wife is to receive the money

therein, but on the contrary that the money is to be paid to

appellant. No fact is alleged which shows the law any interest in the

subject matter which will be affected by the judgment, or that any

contract to pay appellant only should not be revealed. The court

did not err in denying her application to be made a party.

The judgment is reversed and the cause is remanded with directions

to sustain appellant's motion for a new trial.

Reversed and remanded with directions.

Abstract

56A

AGENDA NO. 2

8111.A. 542

APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A.D. 1941

BROWN,
Appellant

BROWN, JR.,
Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
WILL COUNTY.

Appellee.

DOVE, J.

On June 29, 1935 appellant, Joanne Semrow, filed her complaint to recover from appellee damages which she alleged she sustained by reason of his breach of his promise to marry her. In the same complaint, the father of appellant sought to recover damages he alleged he sustained, because appellee had debauched his daughter and he had been deprived of her services. By his answer, appellee admitted he had had sexual intercourse with appellant/ ^{and} that she became pregnant and gave birth to a child, but alleged that he paid appellant \$705.00 in full satisfaction of a judgment rendered against him in a bastardy proceeding, and specifically denied that he ever at any time requested her to marry him or ever at any time promised

IN THE
APPELLATE COURT OF INDIANA
SECOND DISTRICT

May Term, A.D. 1941

APPEAL FROM THE
CIRCUIT COURT OF
MILL COUNTY.

Appellant

v.

GRONK, JR.,

Appellee.

VE, 2.

On June 29, 1935 appellant, Joseph Gronk, filed her complaint
recovery from appellee damages which she alleged she sustained by
reason of his breach of his promise to marry her. In the same complaint,
the father of appellant sought to recover damages he alleged he sustained
cause appellee had abandoned his daughter and he had been deprived of
her services. By his answer, appellee admitted he had not married
and that he became pregnant and gave birth to a child
and alleged that he paid appellee \$30.00 in full satisfaction of a judgment
entered against him in a custody proceeding, and that he had never
ever at any time requested her to marry him or any other person.

o marry her.

The issues made by the pleadings were submitted to a jury and at the close of the evidence for the plaintiffs, the jury, in obedience to a peremptory instruction, found the issues against the plaintiff, Frank Semrow, the father, and the judgment rendered on that finding is not questioned on this appeal. The trial proceeded and at the conclusion of all the evidence, the jury returned a verdict against the remaining plaintiff, Joanne Semrow and from the judgment rendered against her on that verdict, the plaintiff, Joanne Semrow appeals.

The points relied upon for reversal are four. First, that the verdict and judgment are against the manifest weight of the evidence. Second, that the court erred in giving the second, fifth, seventh and eleventh instructions offered on behalf of the defendant. Third, that the court erred in its rulings on the admission and rejection of testimony; and fourth, that counsel for the defendant was guilty of improper conduct in the presence of the jury.

Counsel for appellant, however, has abandoned this fourth point as his argument is divided into three parts, one of which is devoted to his contention that the verdict and judgment is against the manifest weight of the evidence; another, that instructions two, five and seven were erroneous and under his third and last division of his argument, ^{all} he says is: "The court committed reversible error in its rulings on the admission and rejection of testimony. Objections to incompetent evidence, even though sustained, do not always cure the harm done. Such testimony may influence the jury, notwithstanding the effort of the court to counteract it." The evidence of which counsel complains or what its character or nature was, nowhere appears in the brief or argument of counsel, nor does counsel advise

this court of what the conduct of opposing counsel consisted of, to which he objects or where in the abstract or in the record could any remarks of counsel or objectionable conduct be found. In this condition of the record, the third and fourth errors relied upon for reversal must be treated as having been abandoned. Objections to improper argument cannot be considered on review where no specific objections were made at the time of the argument and the remarks complained of are not shown by the abstract. *People v. McDonald*, 365 Ill. 233.

In the instant case no motion for a new trial was made. Alleged errors on the admission or rejection of evidence, where the rulings of the court thereon have been excepted to and incorporated in the report of proceedings are open for review even though no motion for a new trial was made. *The People v. Gabrys*, 329 Ill. 101. But in the absence of a motion for a new trial whether the verdict and judgment are against the manifest weight of the evidence are not properly before the court. *Armour v. Penn. R.R. Co.*, 353 Ill. 575. In *Huber v. Van Schaack-Mutual, Inc.*, 368 Ill. 142, our supreme court said: "No motion for a new trial was made and we have held that the question of the sufficiency of the evidence to support the verdict of a jury and the judgment rendered thereon is not open to review unless the question has first been presented to the trial court by such a motion. It is the duty of litigants to seek this mode of relief in the trial court before praying an appeal. *Chicago, Burlington and Quincy Railroad Co., v. Haselwood*, 194 Ill. 69." In *Quillman v. Cockram*, 253 Ill. App. 413, the court said: "In a jury trial if it is desired to save for review the question of the sufficiency of the evidence to sustain the verdict, the losing party must make a motion for a new trial, and upon it being overruled, except to said ruling, and include such motion, order overruling the same and his exception thereto, together with the evidence, in a bill of exceptions. *Yarber v. Chicago and A. R. Co.*, 235 Ill. 589; *People v. Gabrys*, 329 Ill. 101."

its court of what the extent of reviewing...
 objects or where in the record could not...
 counsel or objectionable conduct...
 third and fourth errors relied upon...
 being seen answered. Objections to...
 based on review where no specific...
 argument and the remarks contained...
 People v. McDonald, 338 Ill. 503.
 In the instant case no motion for a new trial was made.
 alleged errors on the admission or rejection of evidence, where the...
 of the court thereon have been excepted to and incorporated in the...
 report of proceedings are open for review...
 trial was made. The People v. Garvey, 338 Ill. 101.
 motion for a new trial where the verdict was...
 against the manifest weight of the evidence and not properly...
 court. Armour v. Bond, 338 Ill. 511. In People v. Garvey...
 trial, Inc., 338 Ill. 142, our supreme court said: "No motion for a...
 trial was made and we have held that the question of the...
 the evidence to support the verdict of a jury and the...
 person is not open to review unless the question has first been...
 the trial court by such a motion. It is the duty of litigants to...
 mode of relief in the trial court before making an appeal...
 Burlington and Quincy Railroad Co., v. Esch, 338 Ill. 511.
 William v. Cookman, 338 Ill. 417, the court said: "The...
 it is desired to save for review the question of the...
 evidence to support the verdict, the losing party must...
 new trial, and upon it being overruled, move for a new trial...
 new motion, order overruling the same and his exception...
 the evidence, in a bill of exceptions. People v. Garvey, 338 Ill. 101.
 338 Ill. 503; People v. Garvey, 338 Ill. 101."

The remaining error relied upon has to do with the giving of three instructions on behalf of appellee. We have examined these instructions, and while not absolutely correct in all respects, we believe they are substantially so and that the jury was fairly instructed upon the issues. Furthermore, the record discloses that none of the instructions now complained of were objected to in the trial court nor did appellant except to any of them being given. In this state of the record, appellant is in no position to complain of the instructions for the first time in this court. *Bellomy v. Bruce*, 303 Ill. App. 349 at page 361. While the charge of the court to the jury is always subject to review on appeal or error without a motion for a new trial, yet the correctness of the charge must be saved for review by appropriate objections and exceptions. *Oil Belt Ry. Co. v. Lewis*, 259 Ill. 108. (110). As we find no reversible error in this record, the judgment will be affirmed.

Judgment affirmed.

The remaining error relied upon was to be with the finding.

Three instructions on behalf of appellants. We have analyzed these

instructions, and while not absolutely correct in all respects, we believe

they are substantially so and that the jury was fairly instructed upon the

issues. Furthermore, the record discloses that none of the appellants

complaints of error were objected to in the trial court nor the questions

except to any of them being given. In this state of the record, we cannot

take any position to complain of the instructions for the first time in this

court. Reliance is placed, 303 Ill. App. 2d on page 211. While the error

of the court to the jury is always subject to review on appeal, we believe

that a motion for a new trial, yet the correctness of the charge must

be saved for review by appropriate objections and exceptions. Off held

Co. v. Lewis, 303 Ill. 108. (110). As we find no reversible error in

the record, the judgment will be affirmed.

Very truly yours,
The Court.

Abstract

FILED

OCT 27 1941

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

October Term, A. D. 1941

Term No. 41M3

Agenda No. 2.

MRS. ADOLPH HEICKE, Assignee)
of DAVE DANZIGER, doing)
business as CENTRAL COM-)
MISSION CO., in the City)
and State of New York,)

Appellee,)

v.)

BANK OF MANSFIELD of)
Mansfield, Mo.,)

Appellant.)

Appeal from
the City Court
of the City of
East St. Louis,
Illinois.

311 I.A. 603

CULBERTSON, J.

This is an appeal from an Order of the City Court of the City of East St. Louis, in favor of Appellee, MRS. ADOLPH HEICKE (hereinafter called Plaintiff), and against the Appellant, BANK OF MANSFIELD of Mansfield, Mo. (hereinafter called Defendant), in the sum of \$598.44 (including costs and interest) and in which was included a conditional judgment against another bank, as garnishee. The Order of Court likewise excluded all evidence and exhibits relative to "witness Karp."

The action arose as the result of transactions between Dave Ellis, who was in the poultry business at Mansfield, Missouri, and a Dave Danziger, who did a commission business under the name of Central Commission Company, in New York City. The evidence disclosed that Dave Ellis had transacted business with the said Dave Danziger,

and the method by which such business would be transacted would be substantially as follows: Dave Ellis would purchase poultry in the neighborhood of Mansfield, Missouri, and then ship the poultry in carload lots to Danziger in New York, with sight draft and bill of lading attached. A number of transactions between Ellis and Danziger were completed without the intervention of the defendant, Bank of Mansfield. The poultry was shipped on a commission basis. After Danziger had paid the amount of the sight draft, he would in turn dispose of the poultry, and if Ellis was entitled to a balance over and above the amount of the sight draft, Danziger would pay such sum to him, and if there was a deficiency, a statement of the amount of the overdraft would be mailed to Ellis. There was testimony on behalf of Ellis that he had dealt with one Morris Karp before he began dealing with Danziger, and that he had been solicited by Karp to do business with Danziger, after Karp ceased to do business as a representative of the organization with which Ellis had previously dealt. Ellis testified that all of his transactions with Danziger were had ^{with} and through Karp. Karp did not testify.

In December of 1934, ^{Danziger} Ellis testified that he sought to secure a loan from Danziger's organization to finance his operations, but was unsuccessful, and it was suggested to him (presumably by Karp) that he make arrangements with the Mansfield Bank to draw drafts on cars which the Danziger organization would honor at sight, indicating that there would be no trouble at New York with such drafts.

In 1935, Ellis made an arrangement with the Bank of Mansfield by which he would be allowed to ship the poultry, with sight draft attached to a bill of lading, the Bank being designated as consignor and consignee in the bill of lading. It was stated that this was for the purpose of preventing Ellis from Exercising any right of stoppage in transitu, or from diverting the shipment, after Ellis received advancements from the Bank on the draft drawn on Danziger's organ-

ization. The drafts drawn on these shipments (made in 1935) would be directed to Danziger's organization, payable to the order of the Bank of Mansfield, and would be signed by Ellis. It was stated by Ellis, and the Bank, that the method of shipment or the drawing of drafts did not alter previous arrangements as to remitting to Ellis, and Danziger continued to make payments and reports to Ellis.

Danziger testified in this case that he made such payments because of a telephone conversation with Ellis, and someone else at the Bank of Mansfield. There was no evidence, other than the statement of Danziger, that anyone from the Bank had ever had any conversation with him, and it was likewise shown on behalf of the Bank that it had never at any time received statements from Danziger concerning the shipments of poultry, nor were any payments ever made to the Bank by Danziger. Danziger continued to mail checks for surplusages to Ellis until a deficiency occurred on the car in question.

The action before the Court in the instant case concerns one shipment. Ellis loaded a car of poultry, designating the Bank of Mansfield as consignor and consignee, and initialled the bill of lading himself. The shipment arrived in New York, and on February 15, 1935, Danziger's organization rendered an account sales showing, "Sold for account of Dave Ellis Produce Company." Such statement shows that the particular shipment resulted in an overdraft of \$491.51, from which was deducted a credit due to Dave Ellis Produce Company, and to which was added an old overdraft, making the account stated against the Dave Ellis Produce Company in the sum of \$879.14. Thereafter, on February 19, Danziger's organization telegraphed Ellis with reference to another shipment, and thereafter he received further inquiries as to the shipping of additional poultry. Ellis never paid Danziger, nor his organization, the amount of the overdrafts. There was some testimony by Ellis that Karp conferred with him with reference to the overdraft which he owed to Danziger, and likewise, some evidence of

letters written by Karp, on behalf of Danziger's organization, to Ellis. Thereafter, Danziger assigned his claim to his niece, the Plaintiff, Mrs. Adolph Heicke, and sought to collect from the defendant, Bank of Mansfield, Missouri, by an attachment suit making an Illinois bank, where the Defendant had a deposit, a garnishee. Plaintiff, without a trial, had obtained a judgment in a Justice of the Peace Court, and such case was appealed to the City Court of East St. Louis. The case was tried by the Court, without the intervention of a jury.

It is contended by the defendant that the Court erred in entering an Order requiring the defendant to file with the Clerk, all papers and instruments in its possession and under its control, bearing on the issues in the case, such papers and instruments to be impounded by the Clerk of the Court; that the Court also erred in granting the plaintiff's Motion to exclude all the evidence and exhibits relative to Karp (who was not a witness, although referred to as such in the Order of the Court); ~~that the Court likewise erred in rendering judgment in favor of plaintiff and against the defendant, because the judgment of the Court was against the manifest weight of the evidence.~~ In view of what we have to say in this opinion, we deem it advisable to consider only the latter contention of Defendant.

The bill of lading in which the Defendant Bank was made both consignor and consignee, is merely a contract between the shipper and carrier, and is not conclusive of any other transaction (RUDIN v. KING-RICHARDSON CO., 311 Ill. 513; CHI. R. I. & P. R. CO. v. NORTH AMERICAN COLD STORAGE CO., 244 Ill. App. 522; THE CARLOS F. ROSES, 177 U.S. 655, 9 AMER. JURISPRUDENCE, 674, Paragraph 414.) The evidence before the Court clearly established that the bill of lading was given merely as security for payment of the draft attached.

As a matter of fact, the evidence in this case, insofar as the defendant, Bank of Mansfield, Missouri, is concerned, and its status in the transactions between Ellis and Danziger, or Danziger's

organization, is positive, and testimony with reference thereto is virtually unimpeached and uncontradicted. While ordinarily we would not interfere with the conclusion of the Court if there was any evidence to sustain the contentions of the Plaintiff, where the evidence is direct, positive, and uncontradicted, it cannot be disregarded and rejected by the Court in the determination of the rights of the parties before it (KELLY v. JONES, 290 Ill. 375), ~~_____~~
~~_____~~. ~~_____~~).

The Record establishes, without contradiction, that the defendant, Bank of Mansfield, Missouri, received no payments or benefits whatsoever from Danziger; that Danziger continued to make payments to Ellis; and that the bill of lading was made in the name of the Bank, as consignor and consignee, for security purposes only. We state as a finding of fact of this Court the Record signally fails to show any course of dealing between the Bank of Mansfield and Danziger, or any "joint adventure" by the Bank, which could justify a recovery by Danziger, or his assignee. Under the circumstances, the assignee would take the choses in action, subject to all defenses against the assignor (REESE v. SANITARY DIST. OF CHICAGO, 272 Ill. App. 315; ANGELINA COUNTY LUMBER CO. v. MICHIGAN CENTRAL R. CO., 252 Ill. App. 82).

We must, therefore, conclude that the judgment of the City Court of East St. Louis was erroneous. Such judgment is, therefore, reversed, and judgment is entered here in favor of the defendant, Bank of Mansfield, Missouri, and as against the plaintiff, Mrs. Heicke.

Reversed, and judgment entered here.

Abstract

41687

PETER KUTRZEB,)
Appellant,)

APPEAL FROM

v.)

SUPERIOR COURT,

JOHN SOLEWSKI,)
Appellee.)

COOK COUNTY.

311 I.A. 603²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by him through defendant's negligence in driving his automobile which struck and injured plaintiff as he was crossing the street from a street car from which he had alighted, and before he had reached the curb. There was a jury trial, a verdict and judgment in defendant's favor and plaintiff appeals.

The record discloses that about 9:45 p. m., October 19, 1938, plaintiff who was then about 58 years old, boarded a street car near his home in the southwest part of the city. The street car was traveling northeasterly on Archer avenue and when it reached Poplar avenue, an intersecting street which was near his place of employment, plaintiff alighted from the street car from the front door which the motorman had opened to permit passengers to alight. As he was walking toward the southerly curb of Archer avenue he was struck and injured by the right front headlight of defendant's automobile.

Plaintiff's evidence is to the effect that he had reached a point which was about 2 feet from the curb when he was struck, while defendant's position is that he was driving his car at from 15 to 20 miles an hour and about 200 to 300 feet behind the street car when he saw it come to a stop at Poplar avenue and plaintiff alight from the street car; that there was another automobile in front of defendant's and that the street car, after the passengers alighted, started up and the automobile ahead of defendant's continued without stopping, as did defendant;

PETER KUTSEBA,
Appellant,

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY,

JOHN GOLZOWSKI,
Appellee.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

311 I.A. 608

Plaintiff brought an action against defendant to

recover damages for personal injuries claimed to have been

sustained by him through defendant's negligence in driving his

automobile which struck and injured plaintiff as he was crossing

the street from a street car from which he had alighted, and

before he had reached the curb. There was a jury trial, a verdict

and judgment in defendant's favor and plaintiff appeals.

The record discloses that about 9:45 p. m., October 19,

1938, plaintiff who was then about 58 years old, boarded a street

car near his home in the southwest part of the city. The street

car was traveling northeasterly on Archer avenue and when it

reached Poplar avenue, an intersecting street which was near his

place of employment, plaintiff alighted from the street car from

the front door which the motorman had opened to permit passengers

to alight. As he was walking toward the southerly curb of Archer

avenue he was struck and injured by the right front headlight

of defendant's automobile.

Plaintiff's evidence is to the effect that he had

reached a point which was about 2 feet from the curb when he was

struck, while defendant's position is that he was driving his

car at from 15 to 20 miles an hour and about 200 to 300 feet

behind the street car when he saw it come to a stop at Poplar

avenue and plaintiff alight from the street car; that there was

another automobile in front of defendant's and that the street

car, after the passengers alighted, started up and the automobile

ahead of defendant's continued without stopping. As did defendant:

that plaintiff had stepped up on the curb which was about 5 or 6 inches high, fallen backwards and struck the right front headlight of the automobile.

The motorman and plaintiff gave testimony to the effect that plaintiff was struck before he had reached the curb - about 2 feet from it. Clarence Rhinehart, a police officer who was driving an automobile in the line of his duty northeasterly in Archer avenue, and some distance behind defendant's automobile, also gave testimony which to some extent corroborated the testimony of plaintiff and the motorman.

The answer filed by defendant to the complaint denied any negligence and alleged that "plaintiff alighted from the street car in the middle of the block rather than at the intersection;" that "plaintiff jumped off the street car while it was in motion and into the path of the defendant's automobile."

Plaintiff contends defendant's proof did not correspond with the allegations of his answer filed to the complaint - a variance between the allegations of defendant's answer and his testimony. If there was any merit in this point it is not saved because there was no suggestion made on the trial that there was any such variance.

Plaintiff further contends the verdict is against the manifest weight of the evidence. We think this contention must be sustained. We do not discuss the evidence further for the reason that we think what we have heretofore said is sufficient. This court has the power and the duty to set aside a verdict and judgment where the court is of opinion the verdict is against the manifest weight of the evidence. This has long been the established law in this state. One of the most recent cases passing on this point where the subject is thoroughly gone into is Coreoran v. City of Chicago, 373 Ill. 567, where the judgment of this court, 296 Ill. App. 645, (abst.), was affirmed.

that plaintiff had stepped up on the curb which was about 8 or 9 inches high, fallen backwards and struck the right front headlight of the automobile.

The motorman and plaintiff gave testimony to the effect that plaintiff was struck before he had reached the curb - about 2 feet from it. Clarence Klinehart, a police officer who was driving an automobile in the line of his duty northeasterly in Archer avenue, and some distance behind defendant's automobile, also gave testimony which to some extent corroborated the testimony of plaintiff and the motorman.

The answer filed by defendant to the complaint denied any negligence and alleged that "plaintiff alighted from the street car in the middle of the block rather than at the intersection;" that "plaintiff jumped off the street car while it was in motion and into the path of the defendant's automobile."

Plaintiff contends defendant's proof did not correspond with the allegations of his answer filed to the complaint - a variance between the allegations of defendant's answer and his testimony. If there was any merit in this point it is not saved because there was no suggestion made on the trial that there was any such variance.

Plaintiff further contends the verdict is against the manifest weight of the evidence. We think this contention must be sustained. We do not discuss the evidence further for the reason that we think what we have heretofore said is sufficient. This court has the power and the duty to set aside a verdict and judgment where the court is of opinion the verdict is against the manifest weight of the evidence. This has long been the established law in this state. One of the most recent cases passing on this point where the subject is thoroughly gone into is Corcoran v. City of Chicago, 293 Ill. 567, where the judgment of this court, 298 Ill. App. 646, (spec.), was affirmed.

Since there must be a new trial we think we ought to say there was no prejudicial error in what the court did in examining plaintiff as to his ability to speak the English language (now probably the American language Carlin v. Millers Motor Corp. 265 Ill. App. 353) or in questioning some of the jurors as to their ability to understand the Polish language. Questions on the latter subject should not have been asked but we think plaintiff was not prejudicially affected. We are further of opinion there was no error in admitting defendant's exhibit 1 which was the receipt given to defendant by the hospital for money he had paid.

For the reason that we are of opinion the verdict is against the manifest weight of the evidence, the judgment of the Superior court of Cook County is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

Since there must be a new trial we think we ought to say there was no prejudicial error in what the court did in examining plaintiff as to his ability to speak the English language (now probably the American language Garin v. Miller Motor Corp. 285 Ill. App. 353) or in questioning some of the jurors as to their ability to understand the Polish language. Questions on the latter subject should not have been asked but we think plaintiff was not prejudicially affected. We are further of opinion there was no error in admitting defendant's exhibit 1 which was the receipt given to defendant by the hospital for money he had paid.

For the reason that we are of opinion the verdict is against the manifest weight of the evidence, the judgment of the Superior court of Cook County is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McGuire, P. J., and Macchett, J., concur.

41729

THE HOME INSURANCE COMPANY, a
Corporation,

Appellee,

v.

THE YELLOW CAB COMPANY, a
Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

311 I.A. 604

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

January 5, 1939, plaintiff brought an action against defendant to recover \$128.64 which it claimed was due it from defendant by reason of the fact it had paid William Sheriff, one of its policy holders, that amount on account of property damage to his automobile occasioned by the negligence of defendant - that plaintiff had been subrogated to the rights of Sheriff. Defendant denied liability on the ground that Sheriff had brought a suit against it to recover for personal injuries and property damage of \$178.64 which resulted from a collision between Sheriff's automobile and one of defendant's cabs, and that defendant had settled the matter in full. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for \$123.64. (The \$5 difference between the amount of the claim and the amount of the judgment is nowhere explained.)

The record discloses that October 13, 1936, William Sheriff's automobile and a cab belonging to defendant company collided, as a result of which Sheriff claimed he had received personal injuries and the automobile had been damaged. Some time prior to the accident plaintiff, The Home Insurance Company, issued its policy covering damage to Sheriff's automobile which is referred to as a \$50 deductible policy. The day after the accident an attorney for Sheriff notified the cab company he had been retained to represent Sheriff and claimed an attorney's lien. October 24 the insurance company settled with Sheriff by paying

THE HOME INSURANCE COMPANY, a Corporation, Appellant,

v.

THE YELLOW CAB COMPANY, a Corporation, Defendant.

NO. 12, JUDGE O'CONNOR DELIVERED THE DECISION IN THE COURT.

January 8, 1939, plaintiff brought an action against defendant to recover \$158.64 which is claimed was due it from defendant by reason of the fact it had paid William Sherill, one of its policy holders, that amount on account of property damage to his automobile occasioned by the negligence of defendant - that plaintiff had been subrogated to the rights of Sherill. Defendant denied liability on the ground that Sherill had brought a suit against it to recover for personal injuries and property damage of \$175.64 which resulted from a collision between Sherill's automobile and one of defendant's cabs, and that defendant had settled the matter in full. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for \$158.64. (The \$5 difference between the amount of the claim and the amount of the judgment is nowhere explained.)

The record discloses that October 1, 1938, William Sherill's automobile and a cab belonging to defendant company collided, as a result of which Sherill claimed he had received personal injuries and the automobile had been damaged. Some time prior to the accident plaintiff, The Home Insurance Company, issued its policy covering damage to Sherill's automobile which is referred to as a 50 deductible policy. The day after the accident an attorney for Sherill notified the cab company he had been retained to represent Sherill and claimed an attorney's lien. October 24 the insurance company settled with Sherill by paying

him \$128.64, the amount of property damage, \$178.64 less \$50 deductible under the policy. January 21, 1937, Sheriff by the same attorney, brought an action in the Circuit Court of Cook County against the Yellow Cab Company and the driver of the taxi to recover the \$178.64, and for personal injuries the ad damnum was \$20,000. March 6, 1937, the suit was settled by the cab company paying Sheriff \$900. It took from him a written document by which he released and discharged the Yellow Cab Company from "all claims and causes of action *** and particularly of and from all claims and causes of action for or by reason of all injuries and damages of whatsoever nature now known to me or which may hereafter develop by reason of an accident happening on the 13th day of October, 1936 at Clybourn and Fullerton Aves." The release was delivered to the cab company and on that date, March 17, 1937, it issued its check for \$900, payable to Sheriff and to his attorney, on which check was written "In full settlement of all claims against the Yellow Cab Co. a Corp." and particularly mentioning the accident of October 13, 1936. The check was endorsed by Sheriff and by his counsel. Over the endorsement appeared the following: "The receipt and acceptance of this check is acknowledged in full and final settlement of the claim or account stated hereon."

The complaint filed in the Circuit Court by Sheriff against the cab company and its taxi driver above referred to, set up the collision that occurred October 13, 1936, the claimed personal injuries, and the damage to the automobile, one paragraph of the complaint being: "7. That by reason of the foregoing the aforesaid automobile of the plaintiff, William Sheriff, was greatly damaged and broken to the extent of One Hundred Seventy Eight Dollars and Sixty Four Cents (\$178.64)."

The Circuit court action involving all of Sheriff's

him \$188.84, the amount of property damage, \$175.00 less \$50 deductible under the policy, January 31, 1937, Sheriff by the same attorney, brought an action in the Circuit Court of Cook County against the Yellow Cab Company and the driver of the taxi to recover the \$178.84, and for personal injuries the defendant was \$20,000. March 5, 1937, the suit was settled by the cab company paying Sheriff \$900. It took from him a written document by which he released and discharged the Yellow Cab Company from "all claims and causes of action now and hereinafter of and from all claims and causes of action for or by reason of all injuries and damages of whatsoever nature now known to be or which may hereafter develop by reason of an accident happening on the 13th day of October, 1936 at Clybourn and Madison Aves." The release was delivered to the cab company and on that date, March 17, 1937, it issued its check for \$900, payable to Sheriff and to his attorney, on which check was written "In full settlement of all claims against the Yellow Cab Co. a Corp." and particularly mentioning the accident of October 13, 1936. The check was endorsed by Sheriff and by his counsel. Over the endorsement appeared the following: "The receipt and acceptance of this check is acknowledged in full and final settlement of the claim on account stated hereon."

The complaint filed in the Circuit Court by Sheriff against the cab company and its taxi driver above related to, set up the collision that occurred October 13, 1936, the claimed personal injuries, and the damage to the automobile, one paragraph of the complaint being: "That by reason of the foregoing the aforesaid automobile of the plaintiff, William Sheriff, was greatly damaged and broken to the extent of One Hundred Seventy Eight Dollars and Sixty Four Cents (\$178.84)."

The Circuit Court action involving all of Sheriff's

claims against the taxi company having been settled in March, 1937, nothing further appears until a year and a half afterward, viz., August 11, 1938, when an attorney representing plaintiff insurance company wrote a letter to the cab company in which it stated it had been subrogated to the rights of William Sheriff growing out of the accident of October 13, 1936; that plaintiff had been advised the action had been settled and that counsel for the insurance company was informed the Yellow Cab Company would take care of the interest of the insurance company. Plaintiff's claim not having been paid, the instant case was brought.

Defendant contends it settled all claims arising out of the accident when it paid the \$900 to Sheriff and took his release. And the argument is that since plaintiff says at that time the attorney who represented Sheriff also represented the insurance company, notice to him was notice to the plaintiff insurance company; that defendant had no notice or knowledge of the claimed interest of the insurance company and therefore the release is a bar. We think the contention must be sustained on the ground that the finding of the trial court is against the manifest weight of the evidence.

Sheriff, called by plaintiff, testified that shortly after the accident he was visited by a representative of the cab company at the hospital and a number of times thereafter; that he had employed an attorney to handle the case; that afterward he and his wife called at the cab company's office and settlement was discussed; that they offered to pay for the time he had lost from work, plus about \$100 for injuries; that he was to be paid the doctor and hospital bills and the damage to his automobile; that several months after his suit was brought, he settled the matter by executing the release, as above stated. His attorney was called by plaintiff and testified that about a month after

claims against the taxi company having been settled in March, 1937, nothing further appears until a year and a half afterward, viz., August 11, 1938, when an attorney representing plaintiff insurance company wrote a letter to the cab company in which it stated it had been subrogated to the rights of William Sheriff growing out of the accident of October 18, 1936; that plaintiff had been advised the action had been settled and that counsel for the insurance company was informed the Yellow Cab Company would take care of the interest of the insurance company. Plaintiff's claim not having been paid, the instant case was brought.

Defendant contends it settled all claims arising out of the accident when it paid the \$300 to Sheriff and took his release. And the argument is that since plaintiff says at that time the attorney who represented Sheriff also represented the insurance company, notice to him was notice to the plaintiff insurance company; that defendant had no notice or knowledge of the claimed interest of the insurance company and therefore the release is a bar. We think the contention must be sustained on the ground that the finding of the trial court is against the manifest weight of the evidence.

Sheriff, called by plaintiff, testified that shortly after the accident he was visited by a representative of the cab company at the hospital and a number of times thereafter; that he had employed an attorney to handle the case; that afterward he and his wife called at the cab company's office and settlement was discussed; that they offered to pay for the time he had lost from work, plus about \$100 for injuries; that he was to be paid the doctor and hospital bills and the damage to his automobile; that several months after his suit was brought, he settled the matter by executing the release, as above stated. His attorney was called by plaintiff and testified that about a month after

the accident he discussed with Mr. Gard, representing defendant, the question of settlement; that he told Mr. Gard he represented Sheriff in his claim for injuries and also represented the insurance company which at that time had paid Sheriff his property damage under the policy. That afterward they agreed to accept \$900 with the understanding that the cab company would pay the insurance company about \$120.

On the other hand, Gard testified he had been employed by the cab company about 20 years; that he had talked with Sheriff and his wife about January 25, 1937, when there was a suggestion that the case be settled for \$350 - afterward the amount was increased to \$500; that afterward Mr. Sheriff's employers had called and asked that the matter be disposed of; that no mention was made of the insurance company's claim of subrogation or otherwise; that when the attorney was settling the case in the Circuit court suit nothing was said about the rights of the insurance company; that if he had discussed the question of subrogation with counsel there would have been a different sort of release prepared and the printed form would not have been used; that in such cases they never settled matters piecemeal.

Upon a careful consideration of all the evidence in the record, and taking into consideration the fact that the trial judge saw and heard the witnesses, we are of opinion that when all the evidence is considered, much of which was written, the finding in favor of plaintiff is against the manifest weight of the evidence. When Sheriff's case was settled and the \$900 paid to him, the complaint specifically claimed \$178.64 the amount of the damages to his automobile. There can be no doubt that the parties understood they were settling all claims involved in that action.

Since the case was tried before the court without a jury the judgment will be reversed without remanding. Ebbert

the accident he discussed with Mr. Gard, representing defendant, the question of settlement; that he told Mr. Gard he represented Sheriff in his claim for injuries and also represented the insurance company which at that time had paid Sheriff his property damage under the policy. That afterward they agreed to accept \$900 with the understanding that the car company would pay the insurance company about \$120.

On the other hand, Gard testified he had been employed by the car company about 20 years; that he had talked with Sheriff and his wife about January 25, 1937, when there was a suggestion that the case be settled for \$350 - afterward the amount was increased to \$500; that afterward Mr. Sheriff's employers had called and asked that the matter be disposed of; that no mention was made of the insurance company's claim of subrogation or otherwise; that when the attorney was settling the case in the Circuit court said nothing was said about the rights of the insurance company; that if he had discussed the question of subrogation with counsel there would have been a different sort of release prepared and the printed form would not have been used; that in such cases they never settled matters piecemeal. Upon a careful consideration of all the evidence in the record, and taking into consideration the fact that the trial judge saw and heard the witnesses, we are of opinion that when all the evidence is considered, much of which was written, the finding in favor of plaintiff is against the manifest weight of the evidence. When Sheriff's case was settled and the \$900 paid to him, the complaint specifically claimed \$178.64 the amount of the damages to his automobile. There can be no doubt that the parties understood they were settling all claims involved in that action.

Since the case was tried before the court without

v. Met. Life Ins. Co., 369 Ill. 306; Kahler v. Marchi, 307 Ill. App. 23. The judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

McSurely, P. J., and Matchett, J., concur.

v. Nat. Life Ins. Co., 205 Ill. 308; Leahy v. Nat. Life Ins. Co., 205 Ill.

App. 23. The judgment of the Municipal Court of Chicago is

reversed.

JUDGMENT REVERSED.

McKENNEY, P. J., and McKEHEE, J., concur.

tract

General number 9258.

Agent's number 11.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

OCTOBER TERM, A. D. 1941.

~~THE~~ PEOPLE ex rel, JOHN
FAULSTICH,

Appellee,

-vs-

WILLIAM B. MCBRIEN, Mayor
of the City of Staunton,
Macoupin County, Illinois,

Appellant.

APPEAL FROM THE CIRCUIT COURT

OF MACOUPIN COUNTY

311 I.A. 653

HONORABLE VICTOR HEN KILL,

Judge Presiding.

HAYES, P. J.

Prior to January 2, 1940, Edward Sandidge was employed by the City of Staunton, Illinois, as line man and chief electrician. On December 15, 1939, the city council of the city of Staunton passed an ordinance over the Mayor's veto, which ordinance provided that all regular employees, as distinguished from city officers or casual employees, should be hired by the city council and that persons holding such positions at the time the ordinance was passed, should hold their positions during the pleasure of the city council until that body should replace them with new employees. A provision was made for applications to be made to the city council, in writing, by persons desiring employment. On January 2, 1940, John Faulstich, relator herein, filed his application for the position then held by Sandidge, and on the same date his application was accepted by the city council.

1302

Serial number 1302.

THE CITY OF CHICAGO

OFFICE OF THE CLERK

CHICAGO, ILL.

January 1, 1911.

8111A.653

THE PEOPLE OF THE CITY OF CHICAGO

Applicant,

-vs-

WILLIAM E. HAYES, Mayor
of the City of Chicago,
Illinois.

Appellant.

CHICAGO, ILL.

Prior to January 1, 1911, HAYES was
 employed by the City of Chicago, Illinois, as his
 and chief clerk. On January 1, 1911, the City
 Council of the City of Chicago passed an ordinance over
 the Mayor's veto, which ordinance provided that all regular
 employees, as distinguished from one office or casual
 employees, should be hired by the City Council and that
 persons holding such positions as the City Council
 was passed, should hold their positions during the
 pleasure of the City Council until such time as they
 replace them with new employees. A provision was made
 for applications to be made to the City Council, in writing,
 by persons desiring employment. On January 1, 1911, HAYES
 instructed, Mayor Hayes, filed an application for the
 position then held by HAYES, and on the same day his
 application was accepted by the City Council.

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On January 6, 1940, Faulstich presented himself for work, but he was refused employment on the order of the Mayor. On January 11, 1940, the People on the relation of Faulstich filed a petition for writ of mandamus in the Circuit Court of Macoupin County against the Mayor, William B. McBrien, praying that the writ should issue to compel him to remove Sandidge and to permit Faulstich to perform the duties as line man and chief electrician for the city of Staunton. The defendant filed a motion to strike the petition, which was overruled by the trial court. The defendant then filed an answer to the complaint which was stricken on motion of the relator, and the default of the defendant was entered. The Court entered a final judgment ordering the ouster of Sandidge and compelling the defendant to permit the relator to perform the duties of line man and chief electrician for the city. An appeal has been brought to this Court from that judgment.

Appellee herein cites numerous cases, holding that under the statutes of this State the power to appoint officers of a city is vested in the mayor of a city, subject to the approval of the city council, and therefore argues that the ordinance passed by the City Council of the City of Staunton is invalid, because it conflicts with the procedure outlined in the statute and these decisions. *Bullis v. City of Chicago*, 235 Ill. 472; *Moon v. Mayor*, 214 Ill. 40; *People v. McCann*, 247 Ill. 130, 143. This argument overlooks the distinction between city officers and employees, a distinction which the ordinance expressly recognizes.

Appellant on the other hand cites cases holding that a city council has power to contract for certain types of services which are incidental to the performance of

3.

municipal functions, but these cases are likewise not in point. In none of them does it appear that an issue was raised concerning the method of appointment.

We have carefully searched the statutes of this state and the decisions of the courts of review construing them, and have found no authority directly in point. While express provision is made for the appointment of municipal officers (Ill. Rev. Stats. 1939, Ch. 24, P. 86) no provision is made for the employment of regular employees of a city. 21.177
Section 65 of the Cities and Villages Act, however, does grant power to the city council "to control finances and property" of the city, Ill. Rev. Stats. Ch. 24, Section 65. 21.065
It would seem from this provision, therefore, that the necessary power of appointing employees to carry out the duties imposed therein should be implied and would vest in the council itself unless delegated to the mayor by ordinance pursuant to the provisions of Section 24 of the same statute, Illinois Revised Statutes 1939, Chapter 24, Section 24.
This result is supported by the general rule that the power of appointment is regarded as one of the prerogatives of sovereignty, *People ex rel Gallas v. Krupicka*, 279 Ill. App. 269, and "whenever a power is conferred upon a municipal corporation by the Legislature, and no officer or person is expressly authorized to exercise such power, the common council of the municipality is the only authority which can exercise it." *Mc Quillin on Municipal Corporations* (Second Ed.) Volume 2, page 158.

The judgment of the Circuit Court of Macoupin County is therefore affirmed.

JUDGMENT AFFIRMED.

General Number 9272.

Agenda number 8.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

OCTOBER TERM, A.D. 1941.

HARRY M. STERN and SAM STERN, :
Co-Partners, doing business :
as STERN FURNITURE COMPANY, :
RELIABLE FURNITURE COMPANY, :
et al., :

Plaintiff-Appellees, :

-vs- :

GLENN ROGERS, GEORGE KENNEL, :
DON POWELL, et al., :

Defendant-Appellants. :

APPEAL FROM THE CIRCUIT COURT
OF SANGAMON COUNTY.

311 I.A. 654

HONORABLE LAWRENCE E. STONE,

Judge Presiding.

HAYES, P. J.

This is an appeal from a judgment of the Circuit Court of Sangamon County by Glenn Rogers, George Kennel, and Don Powell, defendants-appellants, finding them guilty of contempt of court for violating the terms of an injunction, in which the punishment for each was fixed at confinement in the Vandalia State Farm, for a period of six months.

The three defendants, prior to May 8, 1940, had been employees of the Stern Furniture Company, which consisted of Harry M. Stern and Sam Stern, partners. The said three defendants were members of the Chauffeurs, Teamsters, Helpers Union #532 of Springfield, Illinois. On May 13, 1940, a strike on said firm was called by said Union and its members. On the 14th day of May, 1940, this suit was filed, and an injunction obtained against said Union and certain of its members,

JOHN

DATE: 10-10-55.

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U.S. DEPARTMENT OF AGRICULTURE

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...and the

the three witnesses, who on 5, 1940, 1941

been employees of the Texas Southern Company, which maintains

of 1907. The same day, 1907.

Information was received of the death of the following persons:

[illegible]

On 11/11/1964, the following information was received from the

one last day of 1977, 1980, this will not 1977, the 1977

tion obtained compared with that obtained in the control.

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including the three defendants. On June 20, 1940, the plaintiffs filed their verified petition for a rule directed against the defendants and others, to show cause why they should not be held in contempt of court for an attack committed by them on the person of Floyd Clayton, an employee of the Sterns Furniture Company.

The evidence discloses that shortly after the strike, trucks making deliveries for the furniture company were followed by former employees and their sympathizers in automobiles, ranging in number from six to eighteen. When the trucks would stop to make deliveries of the furniture, the employees would obstruct the deliveries and threaten and coerce the customers of the company so that they would refuse to accept the deliveries. The three defendants went to the home of Floyd Clayton, who remained an employee in the Stern Furniture Company, to induce him to go on strike with them and join the picket line. He refused to do so and was told by them that he would be sorry. Shortly thereafter, at three o'clock one morning, while Clayton and his family were asleep, a shot was fired into the room in which he slept. On June 19, the three defendants assaulted the said Clayton, gave him a severe beating, and left him unconscious. He was taken by the police to the hospital where his wounds were sewed up and it was found that he suffered a concussion of the brain.

It appears from the record that prior to this labor trouble, the three defendants and Clayton were friendly towards each other, and all were apparently good citizens.

Complaint is made that the punishment is excessive. Appellants contend that it should be treated as an ordinary assault and battery case. The violence here was excessive as

3.

well as unlawful.

Our Supreme Court has laid down the rule, binding on the Court, that: "The law is well settled that a Court of Chancery may impose a fine alone for the violation of an injunction and commit the party until the fine and costs are paid, or, in its discretion, may fix a definite period of imprisonment, either with or without a fine. The court granting the injunction is necessarily invested with large discretion in enforcing obedience to its mandate, and upon proceedings for attachment for its violation the extent of the fine and imprisonment to be inflicted as a punishment for the contempt rests in the sound legal discretion of the court itself. *Hake v. The People*, 230 Ill. 174.

The punishment imposed in a contempt proceeding is not necessarily tested by the penalties provided for criminal offenses of a similar nature. *Hake v. The People*, *ibid*.

It may be that the members of this Union were well justified in the demands they were making for a higher wage, in view of the advancing cost of living. The trend of public policy in this country is to give the wage earner a wage that will permit him and his family to live on a higher standard than in the past. Our government has made considerable progress to bring this about in a lawful, peaceful way, but the defendants who take the law in their own hands and commit unlawful acts of violence hurt a laudable cause rather than help it, and must be held responsible for their unlawful acts of violence.

We are of the opinion that the evidence clearly preponderates in favor of the finding of the court below, but in view of defendants having been law-abiding, working men up to the time of the case in question, and the circumstance that they were under a strain at that time, we feel that an imprisonment

• *Examine the following:*

1990

[illegible]

1. The following are the names of the persons who have been appointed to the various committees of the Board of Directors:

[illegible]

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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for a period of three months will amply vindicate the law, whereas
an imprisonment of six months as fixed by the Trial Court, would
keep the defendants away from their work and families unduly.
The additional three months would result in more harm than good.
We find that the sentence should be modified so as to make the
term of imprisonment three months rather than six months.

For that reason we reverse and remand the case to the
Trial Court with directions to modify the sentence fixing the
imprisonment for a period of three months.

REVERSED AND REMANDED WITH DIRECTIONS.

Extract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October Term, A.D. 1941

Gen. No. 9288

Agenda No. 7

William K. Galeener,
Plaintiff-Appellant,
vs.

Appeal from
Circuit Court
Champaign County.

Edward F. Hessel and Emma Alms,
Administrators of the Estate of
John Frederick Hessel, Deceased,
Defendants-Appellees.

700
311 I.A. 654²

Fulton J:

William K. Galeener, Appellant in this Court and Plaintiff below, brought this action in the Circuit Court of Champaign County to recover for services rendered John Frederick Hessel during his lifetime covering a period from July 1, 1931 to December 31, 1935. The Appellant was employed first by Hessel under a written contract beginning March 1, 1929, to the end of the calendar year at a salary of \$125.00 per month. A further written contract provided for employment during the year 1930 at a salary of \$143.50 per month. After 1930 Appellant continued in the employment of Hessel without any new written contract until December, 1935. During the first six months of 1931, he was paid \$143.50 per month. From July 1, 1931

5051501

STATE OF ILLINOIS
JUDICIAL DEPARTMENT
THIRD DISTRICT

October Term, A.D. 1931

Gen. No. 2283

Plaintiff-Appellant, William F. Galsener, vs. Defendant-Appellee, Edward F. Hessel and Mrs. Alice Administrators of the Estate of John Frederick Hessel, Deceased. Delandus-Appellee.	Circuit Court Champaign County.
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Written 3:

William F. Galsener, Appellant in this Court and Plaintiff below, brought this action in the Circuit Court of Champaign County to recover for services rendered John Frederick Hessel during his lifetime covering a period from July 1, 1921 to December 31, 1930. The Appellant was employed first by Hessel under a written contract beginning March 1, 1920, to the end of the calendar year 1921 salary of \$125.00 per month. A further written contract provided for employment during the year 1922 at a salary of \$145.00 per month. After 1922 Appellant continued in the employment of Hessel without any new written contract until December, 1930. During the first six months of 1931, he was paid \$145.00 per month. From July 1, 1931

to December 1932, he was paid \$15.00 per week and from December, 1932 to October 5, 1935, he was paid the sum of \$6.25 per week. On a trial, the jury found the issues for the Appellees, and it is from a judgment on such verdict that the Appellant brings this appeal.

The suit was started in 1936 during the lifetime of Hessel, and the complaint as filed consisted of three counts. The first two counts charged slander, ill treatment and mental suffering resulting therefrom, upon which action abated with the death of Hessel in 1939. The third count which was amended after the substitution of the Administrators of the Hessel Estate as parties defendant, charged that Hessel agreed with Appellant in an oral contract that Appellant should receive the same compensation for his services after January 1, 1931, as was shown in the former written contract for the year 1930, until such time as a new contract or agreement should be mutually agreed upon between Appellant and Hessel. The complaint further charged that no new or different contract was ever entered into between the parties; that Appellant continued to render services up to December 31, 1935, completely performing the oral contract on his part but that he had only received part payment on his salary, by reason of which he had suffered great loss and damage.

The answer of the Appellees sets forth two specific defenses, one of payment and the other the bar of the Statute of Limitations.

to December 1932, he was paid \$25.00 per week and from
December, 1932 to October 6, 1935, he was paid \$25.00 and
\$8.25 per week. On a trial, the jury found the issues for
the Appellee, and it is from a judgment on such verdict
that the Appellant brings this appeal.

The suit was started in 1935 during the lifetime of
Hessel, and the complaint as filed contained all those counts.
The first two counts charged, among other things, that
mental suffering resulting therefrom, in an action which
arose out of the death of Hessel in 1932. The third count
which was amended after the institution of the administrative
force of the Hessel Estate as parties before and, alleging that
Hessel agreed with Appellant in an oral contract that Appellant
should receive the same compensation for his services
after January 1, 1931, as was paid in the former contract.
Contract for the year 1930, and also as a part of the
or agreement should be actually agreed upon between Appellant
and Hessel. The complaint further charges that he was on
affiant contract was ever entered into between the parties;
that Appellant attempted to render services as an attorney
31, 1935, completely pertaining to the oral contract on his
part but that he had only received part payment on this salary,
by reason of which he had suffered great loss and damage.

The answer of the Appellees sets forth two separate
defenses, one of payment and the other the bar of the Statute
of Limitations.

In support of his contention the Appellant submitted testimony in brief as follows: The two written contracts. A witness, Janet Robinson, who was employed in the Hessel office during the year 1930 and until February, 1931 testified that she drew checks for the Appellant for the sum of \$143.50 each month and that the last one was for February, 1931; that in the early part of 1931 she overheard a conversation between Galeener and Hessel in which the latter said in a discussion over the question of Appellant's compensation, "We will just continue on as we have for the past year until I make a new contract."

Mrs. Nelle Kelley, another witness, was employed in the Hessel office from March 1, 1931 to September of the same year. She stated that when she first went to work at Hessel's he told her Mr. Galeener was to receive \$143.~~50~~ a month.

Charles Dillman, another of Appellant's witnesses, testified that he was employed in Hessel's office from November, 1929 to February, 1934, and intermittently thereafter when called; that Galeener was likewise employed during that period of time and worked on books, collections, loans, income taxes and general work in connection with the Hessel office; that he heard a conversation between Hessel and Galeener shortly after he began work there in which Appellant asked Hessel for a new contract and the latter replied, "Well, we will fix up a contract all right, but not now, later on possibly, I believe he said possibly the next Sunday or something like that."

In support of his contention the appellant submitted testimony in brief as follows: The two witness contracts, a witness, James Robinson, who was employed in the United office during the year 1930 and until February, 1931 testified that she drew checks for the appellant for the sum of \$132.00 each month and that the first one was for February, 1931; that in the early part of 1931 she observed a conversation between Galanter and Hessel in which the latter said in a discussion over the question of "household" communication, "we will just continue on as we have for the past year until I make a new contract."

Mrs. Nellie Kallen, another witness, was employed in the United office from March 1, 1931 to September of the same year. She stated that when she first went to work at Hessel's he told her Mr. Galanter was to receive \$132.00 month.

Charles Dillman, another of Appellant's witnesses, testified that he was employed in Hessel's office from November, 1930 to February, 1931, and subsequently thereafter when called; that Galanter was likewise employed during that period of time and worked on books, collections, loans, income taxes and general work in connection with the Hessel office; that he heard a conversation between Hessel and Galanter shortly after he began work there in which Appellant asked Hessel for a new contract and the latter replied, "Well, we will fix up a contract all right, but not now, later on possibly, I believe he will possibly the next Sunday or something like that."

Homer D. Howard testified that he was an old friend of Hessel; that he knew Galeener during the time he worked for Hessel up until the year 1936. Also that Galeener looked after Hessel at his home when the latter was sick, doing the cooking and staying with Hessel nights. Nelle Kelley also testified that in June, 1931, Hessel told her to make out the Galeener salary check for \$15.00; that he was cutting down office expense on account of the depression. The ledger sheets from Hessels office show the salary paid to Appellant from June, 1931 to December, 1932 to be at the rate of \$15.00 per week; from December, 1932 to October 5, 1935, to be \$6.25 per week or \$25.00 per month.

There are many other bits of evidence in the record that Galeener complained about the salary payments made to him and that he had many discussions with Hessel concerning the making of a new contract and about questions of salary. This complaint is also voiced in the letters introduced in evidence by the Appellees. It is the position of Appellant that no new or other contract was ever entered into between the parties, and that he is entitled to the difference between \$143.50 and whatever amount he received during his entire service. He further contends that in any event he was never paid anything for the period from October 5, 1935 to December 31, 1935. His testimony is not very clear about the time he quit although it is assumed in his complaint and by his counsel that it was the end of 1935. However, the witness Homer stated that Appellant was working for Hessel

Henry J. Howell testified that he was an old friend of Leland; that he knew Leland during the time he worked for Leland on until the year 1935. After that Leland moved after Leland at his home when the latter was sick, during the coming and working with Leland at night. He testified that in 1935, Leland told him to take out the Leland salary check for \$15.00; that he was called down office expense on account of the depression. The latter speaks from Leland's office after the salary was to be paid from June, 1935 to December, 1935 to be at the rate of \$15.00 per week; from December, 1935 to October 5, 1936, to be \$20.00 per week or \$25.00 per month.

There are many other bits of evidence in the record that Leland's accounting about the salary payments made to him and that he had many discussions with Leland concerning the making of a new contract and about questions of salary. This complaint is also related to the latter's intention in evidence by the government. It is the position of the government that no new or other contract was ever entered into between the parties, and that he is entitled to the salary.

Between \$15.00 and whatever amount he received during his entire service. He further contends that in any event he was never paid anything for the period from October 5, 1935 to December 31, 1935. His testimony is not very clear about the time he left although it is assumed in his complaint and by his counsel that it was the end of 1935. However, the witness Howell stated that Leland was working for Leland

up until 1936, and there is no testimony in rebuttal of this statement.

On behalf of Appellees some 250 bank checks payable to Appellant were offered and received in evidence to show payment. A few of the later checks had endorsed on the face the words "In full of all demands to date ". The Appellant on the stand stated that this notation was not on the checks when received and cashed by him. It is also contended by Appellees that certain of the salary checks contained similar notations and that such words were erased by Galeener before cashing the checks. None of the original checks were submitted with the record in this case for inspection by this Court. The Appellees rely on the above checks as a defense to the claim of Appellant in this case. There is nothing in the record to show the reason for decreasing the salary of Galeener, or why it was so drastically reduced to a nominal amount. We appreciate the law of Illinois to be, that where there is a bona fide dispute as to how much is due and the amount is unliquidated, a payment of the amount claimed by the debtor to be due in full settlement, if accepted by the creditor, is a satisfaction of the claim, but it is also the law that where the amount due a creditor is ascertained and not in dispute, the payment by the debtor and acceptance by the creditor of a less sum will not operate as a satisfaction of the demand. It is only where there has been a compromise in good faith of disputed demands, where there is an honest difference between the parties as to the

as until 1953, and there is no testimony in regard to this statement.

On behalf of appellees some 250 bank checks payable to appellant were offered and received in payment of their demand. A few of the latter checks had addresses on the backs the words "in full of all demands to date". The appellant on the stand stated that this notation was not on the checks when received and cashed by him. It is also contended by appellees that certain of the early checks received by appellant bore notations that such checks were cashed by the appellant before reaching the checks. Some of the original checks were submitted with the record in this case for inspection by the Court. The appellees rely on the above checks as evidence to the claim of appellant in this case. There is nothing in the record to show the reason for demanding the return of the checks, or why it was an unreasonable request to a retail store. It is contended the law of Illinois is to that effect there is a bona fide dispute as to how much is due and the amount is undetermined, a request for the return of the checks by the debtor to be one in full settlement, is accepted by the creditor, is a satisfaction of the claim, but it is when the law that when the amount due a creditor is ascertained and not in dispute, the payment by the debtor and acceptance by the creditor of a check and will not constitute a satisfaction of the demand. It is not clear that there been a counter to any fact of dispute, demand, or that there is an honest difference between the parties as to the

amount due, that such an accord with satisfaction is binding. ✓
Snow v Griesheimer, 220 Ill. 106., Farmers & Mechanics Life
Assn. v Caine, 224 Ill. 599.

Here there is no explanation of the reduction in salary nor no new consideration shown for the change. We are inclined to doubt that the facts and circumstances in this case show a just and honest accord and satisfaction of ✓ the debt owed to this Appellant, and therefore believe that the verdict of the jury was manifestly against the weight of the evidence.

The question of the bar of the Statute of Limitations was raised by a motion to strike and dismiss the first amendment to the complaint and passed upon adversely to the Appellees. We believe the ruling was correct.

We admit that the testimony for services due after the last payment on October 5, 1935, is not very definite, ^{but} there is not contradictory testimony and when the entire evidence is read together it does not admit of the conclusion there was nothing due the Appellant for that period of time. The verdict was for the defendant. If there is enough in the record to show that the Appellant was entitled to a verdict for some amount, it was error for the Court to deny the motion for a new trial. Chicago & Alton R.R. Co. v Woolner Distilling Company, 196 App. 412.

For the reasons above indicated the judgment of the Circuit Court is reversed and remanded.

REVERSED and REMANDED.

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amount due, that such an order with satisfaction is binding.
Know v. Lehigh, 20 Ill. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

There is no question of the reduction in
value and no new consideration shown for the same. The
defendant is bound to show that the value and consideration in
this case show a just and honest accord and satisfaction of
the debt owed to this plaintiff, and therefore believe that
the verdict of the jury was manifestly against the weight of
the evidence.

The question of the law of the State of Illinois
was raised by a motion to strike and dismiss the first count
sent to the jury and was sustained by the court.

It is held that the testimony for revision and after the
first payment on October 3, 1905, is not very material, there
is not contradictory testimony and when the entire evidence
is read together it does not show that the defendant was
not paying the plaintiff the debt owed at that time. The
verdict was for the defendant. It is held that the evidence
recorded to show that the defendant was entitled to a verdict
for some reason, it was found for the plaintiff to have the action
for a new trial. Cited in Allen v. Allen, 100 Ill. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

For the reasons shown in the judgment of the
Circuit Court is reversed and remanded.

REVEREND AND HONORABLE.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

April Term, A. D., 1941.

General No. 9284.

Agenda No. 3.

BESSYE MAY FERGUSON and
JOHN E. FERGUSON,

Plaintiff Appellees,

-vs-

CITY OF SPRINGFIELD,
Municipal Corporation,

Defendant Appellant.

Appeal from
Circuit Court,
Sangamon County.

8111.A. 655

RIESS, J.:

Plaintiff Appellees recovered judgments for damages upon verdicts by a jury in the respective sums of \$1500 and \$500 against the City of Springfield, from which judgments the defendant has appealed to this Court.

Plaintiff Bessye May Ferguson alleged that on the morning of April 12, 1938, after being driven to the curb in front of her home on North Ninth Street in the City of Springfield upon returning from the election poll where she had been taken to vote and while in the exercise of due care for her own safety, she had stepped and violently fallen with one foot and leg into a deep post hole located between the curb and sidewalk, which had been negligently left unfilled and unguarded by defendant's employees, after removing a light pole or support from the ground by use of a "boom truck" while engaged in moving and resetting electric light poles and lines owned and operated by the defendant city, during the process of widening said street, whereby she sustained serious and permanent injuries, and whereby the co-plaintiff, John E. Ferguson, her husband, was deprived of her

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

April Term, A. D., 1941.

Agenda No. 3.

General No. 2824.

BESSIE MAY FERGUSON and
JOHN E. FERGUSON,

Plaintiff Appellees,

-vs-

CITY OF SPRINGFIELD,
Municipal Corporation,

Defendant Appellant.

Appeal from
Circuit Court,
Sangamon County.

311 A. 655

R1558, 1.1

Plaintiff Appellees recovered judgments for damages upon verdicts by a jury in the respective sums of \$1500 and \$500 against the City of Springfield, from which judgments the defendant has appealed to this Court.

Plaintiff Bessie May Ferguson alleged that on the morning of April 18, 1938, after being driven to the camp in front of her home on North Ninth Street in the City of Springfield upon returning from the election poll where she had been taken to vote and while in the exercise of one care for her own safety, she had stepped and violently fallen with one foot and leg into a deep hole located between the curb and sidewalk, which had been negligently left unfilled and unguarded by defendant's employees, after removing a light pole or support from the ground by use of a "boom truck" while engaged in moving and resetting electric light poles and lines owned and operated by the defendant city, during the process of widening said street, whereby she sustained serious and permanent injuries, and whereby the co-plaintiff, John E. Ferguson, her husband, was deprived of her

services as a housewife and was obliged to expend money and time in caring for her. Due statutory notice to the city was alleged to have been given, and the case was tried by a jury upon the fifth and sixth counts of the complaint and defendant's answer denying all liability thereunder. Motions for directed verdicts were interposed by defendant at close of plaintiffs' evidence and of all the evidence and were denied. After verdicts, defendant's motions for judgment notwithstanding the verdict and for a new trial were also heard and denied and judgments were entered, followed by this appeal.

Numerous errors are assigned, the principal of which contentions were that the verdicts and judgments were contrary to the manifest weight of the evidence; that certain instructions were erroneously given or refused; that certain prejudicial evidence was admitted on behalf of the plaintiff and that statutory notice before suit to the city by John E. Ferguson was substantially defective and insufficient.

While the evidence is conflicting, it appears that at the time of the alleged injuries, the defendant was engaged in widening Ninth Street; that it owned and operated the electric light and power system in the city and along the street in question; that while Mrs. Ferguson was being taken to the polls to vote, a crew of defendant's employees were engaged in moving and making certain changes on the line along Ninth Street where the widening was taking place; that upon being returned to her home, the car stopped in the rear of a "boom truck" of the city being used to pull up and remove light poles, which truck was standing next to the curb; that she alighted, stepped across the curb and violently fell into a post hole from which she was assisted by the election car driver, Fred Wond, since deceased, and City Policeman Lapinski, who did not testify. Witness Neill testified in detail to the removal of the pole by the city, the manner in which the plaintiff was injured and to the subsequent filling of the uncovered hole by the city employees; that he had

services as a housewife and was obliged to depend upon the city for her support. The statutory notice to the city was filed in 1907, and the case was tried on a jury upon the first and second counts of the complaint and defendant's answer denying all liability thereunder. Verdicts for directed verdicts were entered on the first and second counts of the complaint, evidence and of all the witnesses and were denied. After verdict, defendant's motion for judgment notwithstanding the verdict and for a new trial were also heard and denied and judgments were entered, followed by this appeal.

Numerous errors are assigned, the principal of which concern the verdicts and judgments and judgments were contrary to the manifest weight of the evidence; that certain instructions were erroneously given or refused; that certain prejudicial evidence was admitted on behalf of the plaintiff and that statutory notice before suit to the city by John T. Ferguson was substantially defective and insufficient.

While the evidence is conflicting, it appears that at the time of the alleged injuries, the defendant was engaged in repairing Ninth Street; that it owned and operated the electric light and power system in the city and along the street in question; that while the Ferguson was being taken to the police to test, a copy of defendant's employees were engaged in moving and making certain changes on the line along Ninth Street where the witness was taking place; that upon being returned to her home, the car stopped in the rear of a "boom truck" of the city which had to pull up and reverse light poles, which truck was standing next to the curb; that she alighted, stepped across the curb and violently fell into a hole about four inches deep, which was caused by the electric car driver, Fred Wood, whose deceased, and City Police Officer, who did not testify. The witness testified in detail to the removal of the hole by the city, the manner in which the plaintiff was injured and to the amount of the uncovered life by the city employees; that he had

sawed up the old pole which was taken from the hole. Certain witnesses for the city denied that they had removed the pole or that any hole was left near the curb.

Much space is given by appellant to argument as to the credibility of plaintiffs' witnesses and certain alleged contradictions in the testimony. These matters were before a jury, and in view of the conflict, it was peculiarly within their province to pass upon the probative force and credibility of the testimony of the various witnesses. It may be fairly remarked that much of the testimony of the defendant's witnesses was inclined to be vague and inconclusive as to the facts and surrounding conditions at the time of the occurrence, and we hold without analyzing the statements or undertaking to pass upon the probative value of the testimony of the various witnesses that the jury were warranted in finding that a post hole existed in the walk; that the same was left unguarded; that she stepped in this hole to the full depth of her limb and was seriously injured, from which injuries she suffered for a considerable length of time and was unable to actively continue in the conduct of her beauty parlor business and in keeping roomers for profit in her home; that her husband was also deprived of her services and incurred both expense and loss of time in caring for her on account of her injuries. No assignment of error is based upon the amount of the verdicts, which we deem to have been moderate in view of all the evidence. Both the questions of negligence and due care were before the jury and were by their verdicts determined in favor of the plaintiffs and were, in our view, amply sustained by the evidence. ✓

It may be conceded as the settled law of this State that the verdict of a jury upon the facts where they are in conflict will not be disturbed by a court of review, unless the Court is firmly of the opinion from such evidence that the verdict and judgment are clearly contrary to its weight. ✓
Mandelkow v. Meyer, 219 Ill. App. 286.
We approved this principle of law in passing on the case of Crocker v. Hatcher-Joseph, Inc., 292 Ill. App. 646, 10 N. E. (2d) 970.

awed up the old pole which was taken from the hole. Certain witnesses for the city denied that they had removed the pole or that any hole was left near the pump.

Much space is given by appellant to argument as to the credibility of plaintiffs' witnesses and certain alleged contradictions in the testimony. These matters were before a jury, and in view of the conflict, it was peculiarly within their province to pass upon the probative force and credibility of the testimony of the various witnesses. It may be fairly remarked that much of the testimony of the defendant's witnesses was inclined to be vague and inconclusive as to the facts and surrounding conditions at the time of the occurrence and we hold without analyzing the statements or undertaking to pass upon the probative value of the testimony of the various witnesses that the jury were warranted in finding that a good hole existed in the wall; that the same was left unguarded; that one stepped in this hole to the full depth of her limb and was seriously injured, from which injuries she suffered for a considerable length of time and was unable to actively continue in the conduct of her beauty parlor business and in keeping roomers for profit in her home; that her husband was also deprived of her services and incurred both expense and loss of time in caring for her on account of her injuries. No assignment of error is based upon the amount of the verdict, which we deem to have been moderate in view of all the evidence. Both the questions of negligence and due care were before the jury and were by their verdicts determined in favor of the plaintiffs and were, in our view, amply sustained by the evidence.

It may be conceded as the settled law of this State that the verdict of a jury upon the facts when they are in conflict will not be disturbed by a court of review, unless the Court is firmly of the opinion from such evidence that the verdict and judgment are clearly contrary to its weight. *Mendelkew v. Meyer*, 219 Ill. App. 486. We approved this principle of law in passing on the case of *Grocker v. Hatcher-Joseph, Inc.*, 232 Ill. App. 346, 10 N. E. (2d) 970.

Concerning the alleged erroneous instructions either given or refused by the Court, we desire to say, first, that the rights of the defendant in issue under the law and facts herein were fairly stated to the jury under defendant's Instructions One and Two. These instructions required the plaintiff, Mrs. Ferguson, to prove by a preponderance or greater weight of the evidence, before she was entitled to recover, the existence of the hole at the point indicated from which defendant, by its employees, had removed a pole; that the condition created by the defendant made said ground unsafe to travel thereon; that the defendant knowing such unsafe condition had an opportunity to repair the same or an opportunity to protect said plaintiff from danger therefrom; that the plaintiff fell and was injured as a result of said condition created by said hole; that on the occasion of her injury, plaintiff was in the exercise of due care for her own safety and could not by the exercise of ordinary care on her own part have avoided the injury, and that a failure to prove any of these elements by a preponderance of the evidence or if the evidence on any of these elements so required to be proven were evenly balanced, "then you should find the defendant not guilty, as to the plaintiff, Bessye May Ferguson."

As to plaintiff John E. Ferguson, the jury were instructed at defendant's instance that he must prove by a preponderance or greater weight of the evidence the existence of the dangerous condition at the time and place involved herein as a result of the negligence of the defendant; that the defendant had notice of said dangerous condition; that after such notice of said dangerous condition the defendant had an opportunity to remove the said dangerous condition or an opportunity to protect the plaintiff Bessye May Ferguson from the same; that the plaintiff Bessye May Ferguson fell and was injured as a result of the said dangerous condition; that she was in the exercise of due care and caution for her own safety on the occasion of said injury and that no failure to use care on the part of said plaintiff contributed to any degree to her said injury, and that as a result of such injuries, the

Concerning the alleged erroneous instructions given
by the Court, we desire to say, first, that the rights of
the defendant in issues under the law and facts herein were fairly stated
to the jury under defendant's Instructions One and Two. These
instructions required the plaintiff, Mrs. Ferguson, to prove by a
preponderance of greater weight of the evidence, before she was entitled
to recover, the existence of the hole in the paint indicated from which
defendant, by its employees, had removed a hole; that the condition
created by the defendant was such as to make it unsafe to travel thereon;
that the defendant knowing such unsafe condition had an opportunity to
repair the same or an opportunity to protect said plaintiff from danger
therefrom; that the plaintiff fell and was injured as a result of said
condition created by said hole; that on the occasion of her injury,
plaintiff was in the exercise of due care for her own safety and would
not by the exercise of ordinary care on her own part have avoided the
injury, and that a failure to prove any of these elements by a prepon-
derance of the evidence or if the evidence on any of these elements is
required to be proven were evenly balanced, "then you should find the
defendant not guilty, as to the plaintiff, Bessie May Ferguson."

As to plaintiff John E. Ferguson, the jury were instructed
at defendant's instance that he must prove by a preponderance of greater
weight of the evidence the existence of the dangerous condition at the
time and place involved herein as a result of the negligence of the
defendant; that the defendant had notice of said dangerous condition;
that after such notice of said dangerous condition the defendant had
an opportunity to remove the said dangerous condition or an opportunity
to protect the plaintiff Bessie May Ferguson from the same; that the
plaintiff Bessie May Ferguson fell and was injured as a result of the
said dangerous condition; that she was in the exercise of due care and
caution for her own safety on the occasion of said injury and that no
failure to use care on the part of said plaintiff contributed in any
degree to her said injury, and that as a result of such injury, she

plaintiff John E. Ferguson suffered injury; that if the plaintiff has failed to prove any one of these things by a preponderance or a greater weight of the evidence, or if you find that the evidence upon any one of the elements which the plaintiff is required to prove is evenly balanced, "then you should find the defendant not guilty, as to the plaintiff John E. Ferguson." All of these elements were serially numbered in the instructions and covered the material allegations of the complaint and answer. While we have not discussed all of the instructions, we have carefully considered the same and find no prejudicial error in the giving or refusal thereof under the evidence herein. ✓

The proof of damages sustained by the plaintiff Mrs. Ferguson would have amply justified a larger verdict than was given in her favor. At the time of Mrs. Ferguson's injury, the evidence showed that she was earning twenty dollars per week from a beauty parlor business in addition to keeping roomers, which income she was obliged to forego for a period of approximately 130 weeks, and that she sustained severe pain and suffering over a long period of time.

It further appears that the plaintiff John E. Ferguson was, on account of her condition, deprived for many weeks of her services and from regularly following and caring for his business of hauling and trucking and took care of his wife, did housework and performed other duties in endeavoring to bring about her recovery during the above period, detailed in the evidence as covering approximately 130 weeks. It further appears that medical services in endeavoring to bring about her recovery included physicians' bills of \$203 and a hospital bill of \$75.95 and other enumerated expenses, for which plaintiffs were jointly and severally liable. ✓

Defendant makes complaint concerning a certain hypothetical question or questions answered by a physician, and contended that the same did not contain all relevant or admitted facts in evidence. From an examination of the abstract and record, we do not find that the question contained material or prejudicial omissions or errors

plaintiff John E. Ferguson suffered injury; and if the plaintiff has
tried to prove any one of these things by a preponderance or a greater
weight of the evidence, or if he has failed to do so, the evidence upon any one
of the elements which the plaintiff is required to prove is evenly
balanced, then you should find the defendant not guilty, as to the
plaintiff John E. Ferguson. All of these elements were actually
numbered in the instructions and covered the material allegations of the
complaint and answer. While we have not discussed all of the instructions,
we have carefully considered the case and find no prejudicial
error in the giving or refusal thereof under the evidence herein.
The proof of damages sustained by the plaintiff Mrs. Ferguson
would have amply justified a larger verdict than was given in her favor.
At the time of Mrs. Ferguson's injury, the evidence showed that she was
earning twenty dollars per week from a beauty parlor business in addition
to keeping house, which income she was obliged to forego for a period
of approximately 120 weeks, and that she sustained severe pain and
suffering over a long period of time.
It further appears that the plaintiff John E. Ferguson was,
on account of her condition, deprived for many weeks of her services
and from regularly following and taking care of his wife, his household and personal
other duties in a household, and that she was not able to follow the
above period, testified in the evidence as covering approximately 120
weeks. It further appears that medical services in endeavoring to
bring about her recovery included physicians' bills of \$200 and a
hospital bill of \$75.35 and other enumerated expenses, for which
plaintiffs were jointly and severally liable.
Defendant makes complaint concerning a certain hypothetical
question of damages presented by a physician, and concluded that the
same did not come in all relevant or admitted facts in evidence.
From an examination of the abstract and record, we do not find that
the question contained material or prejudicial omissions or errors

as contended by the defendant. A particular point concerning the resumption of menstruation by the plaintiff did not bear upon the right of recovery, but could be contended only to have affected the amount of the verdict. No point is made that the same was excessive, and we do not feel from an examination of the record that the jury could have been influenced in a manner prejudicial to the defendant in relation thereto.

The notice given and duly signed by both plaintiffs to the City of their injury, when considered as a whole, complied with the statutory requirements, and we deem the defendant's contention in relation thereto to be without merit.

Upon a full consideration of the abstract, briefs and arguments herein, we are impelled to conclude that the case was tried in a manner that resulted in substantial justice as between the parties and that a retrial herein by another jury would not result in different findings. Believing and finding that the record is free from prejudicial error and that substantial justice has been done between the parties, the judgment of the Trial Court will be affirmed.

JUDGMENT AFFIRMED.

as contended by the defendant. A further point concerning the
resumption of conversation by the plaintiff did not arise upon the
right of recovery, but could be contended only to have effected the
amount of the verdict. No point is made that the same was excessive,
and we do not feel from an examination of the record that the jury
could have been influenced in a manner prejudicial to the defendant
in relation thereto.

The notice given and duly signed by each plaintiff to the
City of their injury, when considered as a whole, complied with the
statutory requirements, and we deem the defendant's contention in
relation thereto to be without merit.

Upon a full consideration of the evidence, briefs and
arguments herein, we are impelled to conclude that the case was tried
in a manner that resulted in substantial justice as between the parties
and that a retrial herein by another jury would not result in different
findings. Believing and finding that the record is free from prejudicial
error and that substantial justice has been done between the parties,
the judgment of the Trial Court will be affirmed.

FOR THE PLAINTIFFS.

tract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

April Term, A. D., 1941.

General No. 9287.

Agenda No. 6.

FRANK REIDEL,

Plaintiff Appellee,

-vs-

SHERWOOD CAMP, CARL DAUGHERTY
and HOMER ENGLISH,

Defendants,

HOMER ENGLISH,

Appellant.

Appeal from
Circuit Court,
McLean County.

311 I.A. 656

RIESS, J.:

By this appeal, the defendant Homer English seeks reversal of a judgment against him in the sum of twenty five hundred dollars entered upon verdict of a jury in favor of the plaintiff appellee Frank Reidel in the Circuit Court of McLean County.

The defendant English, with two co-defendants, was charged with negligence and with wilful and wanton misconduct which allegedly caused damages to the plaintiff when the latter's automobile collided with a truck operated by co-defendant Daugherty.

The complaint was dismissed as to one co-defendant; the other failed to appeal, and the wilful and wanton counts were withdrawn from the jury on motion of the defendants.

Defendant appellant contended that he was not guilty of negligence and that the plaintiff was guilty of contributory negligence which bars his recovery. These are the only questions to be determined upon this appeal.

On November 14, 1939, at about 5:30 P. M., being shortly after dark, the defendant was driving a new Packard automobile from his farm on

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

5111.4.650

April Term, A. D., 1938.

Agenda No. 6.

General No. 2827.

Appellants,
Frank Reibel,
Plaintiff Appellee,
vs.
Homer Reibel, Earl Bernharty,
and Homer Reibel,
Defendants,
Appellants.

Plaintiff Appellee,

-vs-

Homer Reibel, Earl Bernharty,
and Homer Reibel,
Defendants,
Appellants.

REBELS, J.:

By this appeal, the defendant Homer Reibel seeks reversal of a judgment against him in the sum of twenty-five hundred dollars entered upon verdict of a jury in favor of the plaintiff appellee Frank Reibel in the Circuit Court of McLean County.

The defendant Reibel, with two co-defendants, was charged with negligence and with willful and wanton misconduct which allegedly caused damages to the plaintiff when the latter's automobile collided with a truck operated by co-defendant Bernharty.

The complaint was dismissed as to one co-defendant; the other failed to appear, and the willful and wanton counts were withdrawn from the jury on motion of the defendants.

Defendant appellee contended that he was not guilty of negligence and that the plaintiff was guilty of contributory negligence which bars his recovery. These are the only questions to be determined upon this appeal.

On November 14, 1936, at about 8:30 P. M., being shortly after dark, the defendant was driving a new Packard automobile from his farm

Washington Street Road near Bloomington, Illinois. His son and nephew, who had been working on the farm, were sitting in the front seat with him. As he was proceeding eastward on West Washington Street toward the city of Bloomington, he observed a truck approaching from the east. The driver, a defendant in the lower court, motioned for him to stop. He brought his car to a stop on the south side of the gravel highway near the grass shoulder, and the truck stopped on the north side of the highway, almost parallel with his car. The driver of the truck informed him that he had but one headlight which was "making a funny pattern". The defendant then turned on his bright lights, got out of his automobile and went in front of his car. While the defendant was in front of his car, the plaintiff approached from the east in his automobile, and, according to his testimony, dimmed his lights twice as he approached. He also testified that he could see nothing beyond the lights on the defendant's car, and that he did not see the truck north of the defendant's car, which he said was standing still and which was very nearly north of the defendant's car; that his rate of speed was between twenty five and thirty miles per hour; that he crashed into the truck and that the defendant English told him immediately after the collision that he, English, was responsible for the accident and would take care of everything. Plaintiff's wife and adult son, Glenn, testified to similar statements at the hospital and that defendant English said, "My bright lights caused him to run into the back end of my truck." Witness Japson, a disinterested person who was upon his porch about a block away, corroborated much of plaintiff's testimony. Other witnesses testified to location of broken glass, oil spots and other conditions shown on and along the highway and on photographs.

The defendant and his witnesses fixed the speed of the plaintiff's automobile immediately prior to the collision at from thirty five to forty miles per hour, and fixed the point of the collision between thirty five and forty five feet west of the rear of the defendant's automobile. They said the truck was stopped approximately thirty seconds and then proceeded in a westerly direction.

Washington Street near Bloomington, Illinois. His son and nephew, who had been working on the farm, were sitting in the front seat with him. As he was proceeding eastward on West Washington Street toward the city of Bloomington, he observed a truck approaching from the east. The driver, a defendant in the lower court, motioned for him to stop. He brought his car to a stop on the south side of the gravel highway near the glass shoulder, and the truck stopped on the north side of the highway, almost parallel with his car. The driver of the truck informed him that he had but one headlight which was "making a funny pattern". The defendant then turned on his bright lights, got out of his automobile and went in front of his car. While the defendant was in front of his car, the plaintiff approached from the east in his automobile, and, according to his testimony, aimed his lights twice as he approached. He also testified that he could see nothing beyond the lights on the defendant's car, and that he did not see the truck north of the defendant's car, which he said was standing still and which was very nearly north of the defendant's car; that his rate of speed was between twenty five and thirty miles per hour; that he crashed into the truck and that the defendant pulled his immediately after the collision that he, English, was responsible for the accident and would take care of everything. Plaintiff's wife and adult son, when testified to similar statements as the mother and that defendant English said, "My bright lights caused him to run into the back end of my truck". Witness Johnson, a dining room waitress who was upon his porch about a block away, corroborated much of plaintiff's testimony. Other witnesses testified to location of broken glass, oil spots and other conditions upon and along the highway and on photographs. The defendant and his witnesses fixed the speed of the plaintiff's automobile immediately prior to the collision at from thirty five to forty miles per hour, and fixed the point of the collision between thirty five and forty five feet west of the rear of the defendant's automobile. They said the truck was stopped approximately thirty seconds and then proceeded in a westerly

The driver of the truck testified that he had reached a speed of eight or ten miles per hour when the collision occurred and that he was at least fifty feet west of the English car. He and the occupants of the English car all testified that the tail lights on the truck were lit. English testified that the cab of the truck in which Daugherty was riding was a little further west than the place where he sat in his automobile - "about three feet in my opinion". (Rec. p. 69.)

The sufficiency of the complaint is not questioned. Among other things, it charges that the defendant's automobile was faced in an easterly direction in such a manner that the beams of the headlights shown into the face of the plaintiff and completely obscured and prevented him from learning of the presence of the truck stopped upon the highway; that the headlights were turned on bright and were never dropped or dimmed upon the approach of the plaintiff's automobile; that he stopped his automobile in such a position that he knew or should have known that an automobile coming from the east was in danger of colliding with the truck stopped upon said road; that he stopped his automobile upon the main travelled portion of the highway and failed to leave a clear and unobstructed width of at least twenty feet opposite said automobile, when it was then practical to have stopped at a different place, either upon or off the highway, all of which was in violation of Section 185, Chapter 95 $\frac{1}{2}$, Illinois Revised Statutes of 1939.

The rule is well established in this State that the defendant's negligence is a question of fact to be determined by a jury. If from the facts bearing on the question of negligence, reasonable men of fair understanding might draw different conclusions, the question is one of fact and not of law and must be submitted to a jury. Hicks v. Swift & Co., 285 Ill. App. 1, 1 N. E. (2d) 918. Considering the evidence in the light of this rule, the Court did not err in submitting the question of negligence to the jury. ✓

The driver of the truck testified that he had observed a speed of eight or ten miles per hour when the collision occurred and that he was at least fifty feet west of the English car. He and the occupants of the English car all testified that the tail lights on the truck were lit. English testified that he saw at one time in which Dougherty was riding was a light fixture west from the place where he sat in his automobile - "about three feet in my opinion". (Rec. p. 63.)

The sufficiency of the complaint is not questioned. Among other things, it charges that the defendant's automobile was faced in an easterly direction in such a manner that the front of the headlight shown into the face of the plaintiff and completely obscured and prevented him from learning of the presence of the truck stopped upon the highway; that the headlights were turned on bright and were never dropped or dimmed upon the approach of the plaintiff's automobile; that he stopped his automobile in such a position that he knew or should have known that an automobile coming from the east was in danger of colliding with the truck stopped upon said road; that he stopped his automobile upon the well travelled portion of the highway and failed to leave a clear and unobstructed width of at least twenty feet upon said automobile; that he was then negligent to have stopped at a different place, either upon or off the highway, all of which was in violation of Section 100, Chapter 100, Illinois Revised Statutes of 1909.

The wife is well established in this State that the defendant's negligence is a question of fact to be determined by a jury. It from the facts bearing on the question of negligence, reasonable men of fair understanding might draw different conclusions and the question is one of fact and not of law and must be referred to a jury. Stone v. Gulf & Co., 253 Ill. App. 2, 1 N. E. (2d) 918. (1934). Regarding the evidence in the light of said facts, the Court this day set aside the question of negligence to the jury.

The question of whether plaintiff exercised due care and caution for his own safety was also one of fact for the jury, unless his conduct was so clearly and palpably negligent that all reasonable minds would agree that he did not exercise such degree of care and caution as a reasonable, ordinary and prudent person would exercise under the same circumstances. Wedig v. Kroger Grocery & Baking Co., 282 Ill. App. 370.

We have carefully read the abstract, briefs and examined much of the record in this case. Under the evidence herein, the case turned upon questions of fact wherein a jury might have found either way depending upon their view of the probative value and credibility of the testimony of the respective parties and witnesses herein. Under the facts in evidence, we are constrained to hold that the record contained ample proof of plaintiff's cause of action to justify and sustain the verdict, which does not appear to be contrary to the manifest weight of the evidence. We have examined and considered all of defendant's contentions and assignment of error and find nothing in the record that would justify this Court in reversing the judgment of the lower court. ✓

The judgment of the Circuit Court of McLean County will therefore be affirmed.

JUDGMENT AFFIRMED.

The question of whether plaintiff exercised due care and caution for his own safety was also one of fact for the jury, unless his conduct was so clearly and palpably negligent that all reasonable minds would agree that he did not exercise a degree of care and caution as a reasonable, ordinary and prudent person would exercise under the same circumstances. *Wells v. Rogers Grocery & Baking Co.*, 282 Ill. App. 370.

We have carefully read the abstract, briefs and examined much of the record in this case. Under the evidence herein, the case turned upon questions of fact wherein a jury might have found either way depending upon their view of the relative value and credibility of the testimony of the respective parties and witnesses herein. Under the facts in evidence, we are constrained to hold that the record contained ample proof of plaintiff's cause of action to justify and sustain the verdict, which does not appear to be contrary to the manifest weight of the evidence. We have examined and considered all of defendant's contentions and assignment of error and find nothing in the record that would justify this Court in reversing the judgment of the lower court.

The judgment of the Circuit Court of Cook County will therefore be affirmed.

JUDGMENT AFFIRMED.

41430

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. LEO P. RATKOWSKI, et al.,
Appellants.

v.

EDWARD J. KELLY, as Mayor of the City
of Chicago, et al.,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

311 I.A. 657

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

*p. 445
revised
11-p. 657*

The relators are the owners of separate judgments against the city of Chicago rendered July 14, 1938, aggregating \$31,564.98. They filed a petition for mandamus to compel the payment of these judgments. The petition alleged the judgments were due and owing prior to January 1, 1935; that there was sufficient money in the Judgment Tax Fund to pay the judgments and that payment should be made.

The answer of the city admits the rendition of the judgments prior to January 1, 1935, and that the judgments are for liquidated debts due but avers the petition was prematurely filed in that while there was \$107,685.52 in the Judgment Tax Fund there were other judgments against the city also entered prior to January 1, 1935, for liquidated debts to the amount of \$2,533, 180.04; that one of these was in favor of the Sanitary District of Chicago on which the last of several payments was made by the city December 20, 1939, leaving unpaid the principal sum of \$2,515,000; also that one Cohn and the Northwestern Yeast Company hold judgments against the city for \$67,086.06 and \$30,492.78, respectively, both of which were rendered prior to the judgments of relators, and filed petitions for mandamus to compel the payment of each of these judgments prior to the date on which the petition of relators was filed, namely, February 27, 1940.

The city, therefore, contends that relators' suit is precluded by §697a of the Judgment Tax act (Smith-Hurd Anno. Stats., ch. 24, p. 381). This section in part provides: "Judgments against

THE PEOPLE OF THE STATE OF ILLINOIS
 ex rel. LEO P. PATKOWSKI, et al.,
 Appellants.

APPEAL FROM

EDWARD J. KELLY, as Mayor of the City
 of Chicago, et al.,
 Appellees.

CIRCUIT COURT,
 COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The relators are the owners of separate judgments against the city of Chicago rendered July 14, 1938, aggregating \$31,564.92. They filed a petition for mandamus to compel the payment of these judgments. The petition alleged the judgments were due and owing prior to January 1, 1938; that there was sufficient money in the Judgment Tax Fund to pay the judgments and that payment should be made.

The answer of the city admits the rendition of the judgments prior to January 1, 1938, and that the judgments are for liquidated debts due but avers the petition was prematurely filed in that what there was \$107,685.82 in the Judgment Tax Fund there were other judgments against the city also entered prior to January 1, 1938, liquidated debts to the amount of \$2,525,180.04; that one of these was in favor of the Sanitary District of Chicago on which the last of several payments was made by the city December 30, 1939, leaving unpaid the principal sum of \$2,515,000; also that one John and the Northwestern Yeast Company hold judgments against the city for \$67,086.06 and \$30,492.78, respectively, both of which were rendered prior to the judgments of relators, and filed petitions for mandamus to compel the payment of each of these judgments prior to the date on which the petition of relators was filed, namely, February 27, 1940.

The city, therefore, contends that relators' suit is precluded by § 927a of the Judgment Tax act (Smith-Hurd Anno. Stats.,

such city shall be paid out of said fund in the order in which the same were obtained."

The city also contends plaintiffs are precluded by an ordinance of the city of Chicago. (Municipal Code of Chicago, 1939, §§7 -29.) This ordinance is not set up in the pleadings. However, we took judicial notice of it and held it valid in People ex rel. Krajci v. Kelly, 279 Ill. App. 22 at 29. The ordinance, like the statute, provides judgments "shall be paid in the order of the date of entry upon the records of the court."

It is admitted mandamus was the proper method to compel payment of judgments against the city. Relators further contend the date of the order of entry of judgment does not determine the order of payment and in support cite the three cases of People ex rel. Farwell v. Kelly, 361 Ill. 54, 367 Ill. 616 and 367 Ill. 631.

The only witness who testified upon the hearing was Mr. Hill of the city comptroller's office. His evidence disclosed payment of a number of judgments without regard to the time of entry. These payments were not, however, voluntary and with two exceptions were made out of funds other than the Judgment Tax Fund. Relators call our attention to People ex rel. Mercantile Nat'l Bank of Chicago v. City of Chicago, 307 Ill. App. 667, where a judgment of mandamus ordering payment of a judgment against the city was affirmed. We considered that case in People ex rel. Cohn v. Kelly, 308 Ill. App. 50, and said the "principal question was whether the City could properly loan \$600, 000 out of the Judgment Fund to be used for other purposes. The court held this could not be done and it appears if this was restored to the fund there would be sufficient to pay the claim." Upon that ground, apparently, the Second Division sustained the judgment of the trial court.

In People ex rel. Gertz v. Kelly, Gen. No. 41479 (opinion filed February 17, 1941) this court following the Krajci and Cohn cases held the judgment disregarding the tax refund judgment

such city shall be paid out of said fund in the order in which the same were obtained."

The city also contends plaintiffs are precluded by an ordinance of the city of Chicago. (Municipal Code of Chicago, 1-37, §§7-29.) This ordinance is not set up in the pleadings. However, we took judicial notice of it and held it valid in People ex rel. Krajo v. Kelly, 279 Ill. App. 22 at 29. The ordinance, like the statute, provides judgments "shall be paid in the order of the date of entry upon the records of the court."

It is admitted mandamus was the proper method to compel payment of judgments against the city. Relator further contends the date of the order of entry of judgment does not determine the order of payment and in support of the three cases of People ex rel. Fairwell v. Kelly, 301 Ill. 54, 327 Ill. 318 and 327 Ill. 311. The only witness who testified upon the hearing was Mr.

Hill of the city comptroller's office. His evidence disclosed payment of a number of judgments without regard to the time of entry. These payments were not, however, voluntary and with two exceptions were made out of funds other than the judgment tax fund. Relator

call our attention to People ex rel. Versantile Nat'l Bank of Chicago v. City of Chicago, 307 Ill. App. 637, where a judgment ordering payment of a judgment against the city was affirmed. We considered that case in People ex rel. Jones v. Kelly, 308 Ill. App. 80, and said the "principal question was whether the City could properly loan \$600,000 out of the judgment fund to be used for other purposes. The court held this could not be done and it appears if this was restored to the fund there would be sufficient to pay the claim." Upon that ground, apparently, the Second Division sustained the judgment of the trial court.

In People ex rel. Gertz v. Kelly, 308 Ill. App. 217 (1931) filed February 17, 1941, this court following the trial was convinced that the judgment regarding the tax refund judgments

statute to be erroneous and reversed it. This court is committed to the propositions that the ordinance and statute are valid, as was held in the Krajci and Cohn cases. We do not understand the Supreme court in the Farwell cases holds to the contrary.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

statute to be erroneous and reversed it. This court is committed
the propositions that the ordinance and statute are valid, as was
held in the Krejoel and Ogan cases. We do not understand the Supreme
court in the Farwell cases holds to the contrary.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McGarvey, J., concur.

41430

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LEO P. RATKOWSKI, et al.,
Appellants,

v.

EDWARD J. KELLY, as Mayor of the City
of Chicago, et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

311 T A. 657²

ON REHEARING.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Relators, owners of unpaid judgments against the City of Chicago, filed a petition praying for mandamus to compel payment from the Judgment Tax Fund. The City answered denying relators' right to mandamus and setting up the defense that the petition was premature and the suit precluded by § 697A of the Judgment Tax Act (Smith-Hurd Anno. Stat., Chap 24, p. 381). The court heard the evidence, found for defendants and dismissed the suit.

On appeal to this court the judgment was affirmed. A petition for rehearing was denied April 14, 1941. The opinion discloses that the decision of this court followed our prior decision in People ex rel. Cohn v. Kelly, 308 Ill.App. 50, where under similar facts it was held relators there were not entitled to maintain the suit.

On April 28, 1941, relators made a motion to set aside the order denying their petition for rehearing and to continue the matter. In support of the motion our attention was called to the fact that the Supreme Court had granted leave to appeal in People ex rel. Cohn v. Kelly, and that the appeal was pending in the Supreme Court. The motion for a continuance was allowed.

Relators now move that the petition for rehearing be

41430

STATE OF ILLINOIS
EX REL. THE BOARD OF EDUCATION,
Petitioner.

EDWARD J. KELLY, as Mayor of the City
of Chicago, et al.,
Respondents.

ON PETITION.

MR. JUSTICE MORTON DELIVERED THE OPINION OF THE COURT.

Petitioner, a board of school directors against the City of Chicago, filed a petition praying for mandamus to compel payment from the defendant for taxes. The City answered denying petitioner's right to mandamus and setting up the defense that the petition was premature and the writ prohibited by a writ of the defendant for lot (East-West Ave., West 4th St., N. 331). The court heard the evidence, found the defendant was estopped from denying the evidence, and granted the writ.

An appeal to this court from the judgment was allowed. A petition for rehearing was denied April 14, 1941. The opinion discloses that the denial of this court followed our prior decision in People ex rel. Board of Education v. Kelly, 233 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

On April 15, 1941, petitioner was a motion to set aside the order denying their petition for rehearing and to continue the matter. In support of the motion the petitioner had filed an affidavit that the Supreme Court had granted leave to appeal in People ex rel. Board of Education v. Kelly, 233 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

allowed, the judgment of the trial court reversed and the cause remanded with directions to the trial court to issue the writ forthwith. In support of this motion they submit the opinion of the Supreme Court in People ex rel. Cohn v. Kelly, No. 26175, in which petition for rehearing was denied November 12th, 1941.

There are no suggestions to the contrary. Therefore, in conformity with the opinion of the Supreme Court in that case, the petition for rehearing here is granted, the judgment of the Circuit Court reversed and the cause remanded to that court with directions to issue the writ as prayed forthwith.

REHEARING GRANTED, JUDGMENT REVERSED
AND CAUSE REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J. concur.

allowed, the judgment of the trial court reversed and the cause remanded with directions to the trial court to issue the writ forthwith. In support of this motion they submit the opinion of the Supreme Court in People v. Kelly, 20. 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

RECEIVED AT THE CLERK'S OFFICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIS 10TH DAY OF JANUARY, 1911.

Respectfully, J. J. and O'Donnell, J. J.

41963

THOMAS A. MORRIS, JR., and
FRANCES LEAH MORRIS,
Appellees,

v.

HOMER L. PATTERSON,
Appellant.

APPEAL FROM INTERLOCUTORY

ORDER OF SUPERIOR COURT OF

COOK COUNTY, entered July 15,

1941.

3111A.657³

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an interlocutory order which restrained him from disturbing plaintiffs in their possession of certain premises and from proceeding with a forcible entry and detainer suit against plaintiffs to obtain possession of the premises.

Plaintiffs and the defendant entered into an agreement wherein defendant agreed to convey to them a lot in Cook county for \$6900; plaintiffs paid \$1,000 cash and it was agreed that the balance should be paid by them through an F. H. A. (Federal Housing Administration) mortgage.

Apparently there was some dispute between the parties, and in June, 1941, plaintiffs filed their complaint for specific performance. They asserted that they had paid \$1,000 down on the purchase price and that the balance was payable upon completion of a building then being erected on the lot; that subsequently plaintiffs made an additional payment of \$250 and executed all the necessary papers and deposited the expenses in connection with the F. H. A. loan; that defendant refused to provide waivers of contractors' liens on the building and has failed to deliver a deed to the premises although plaintiffs are ready and able to pay, through the mortgage company, the entire balance due under the contract to purchase; that plaintiffs are in possession of the premises but defendant is seeking to oust them from possession. The complaint asked that defendant be ordered to deliver to the

ORDER OF THE COURT OF COOK COUNTY, entered July 15, 1941 FROM INTERLOCUTORY

THOMAS A. MORRIS, JR., and
FRANCES LEAH MORRIS,
Appellees,

v.

HOWARD L. PATTERSON,
Appellant.

1941 JUL 15 663

IT, PRESIDING IN THIS COURT IN DIVISION THE CLERK OF THE COURT

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tractors' liens on the building and has failed to deliver a deed
to the premises although plaintiffs are ready and able to pay,
through the mortgage company, the entire balance due under the
contract to purchase; that plaintiffs are in possession of the
premises but defendant is seeking to oust them from possession.
The complaint asked that defendant be ordered to deliver to the

plaintiffs the waiver of liens in order that the mortgage contemplated could be made and the balance of the purchase price, by means thereof, be paid.

In July plaintiffs filed a petition asking that defendant be restrained from disturbing plaintiffs in possession of the premises and that he be restrained from proceeding with a forcible entry and detainer suit which he has commenced, seeking possession of the premises. The petition further alleged that plaintiffs are ready to perform their part of the contract but are prevented from doing so because of the refusal of the defendant to produce certain papers necessary to procure the mortgage contemplated by the agreement of the parties.

Upon the complaint seeking specific performance and the petition asking for the injunction, the court ordered the writ to issue.

Defendant appealing first says that the court had no jurisdiction to restrain the defendant from prosecuting his action in forcible entry and detainer, asserting that the matters set forth by plaintiffs can be properly raised as a legal defense in the forcible entry and detainer proceedings. The point is without merit. The court had the equitable right to order specific performance of the contract and also to try the legal right of possession. The right of possession was incidental to the right of specific performance of the contract.

In Cordell v. Solomon, 234 Ill. App. 430, 439, it was said that injunctions will be granted until final decree if it appears that less harm from this course will result to the enjoined party if he should be finally victorious than would accrue to the other party, in the absence of an injunction, if he were the winning party. The primary purpose of such a preliminary injunction

plaintiffs the waiver of lien in order that the mortgage contract could be made and the balance of the purchase price, by means thereof, be paid.

In July plaintiff filed a petition asking that defendant be restrained from disturbing plaintiff in possession of the premises and that he be restrained from proceeding with a forcible entry and detainer suit which he has commenced, seeking possession of the premises. The petition further alleged that plaintiffs are ready to perform their part of the contract but are prevented from doing so because of the refusal of the defendant to produce certain papers necessary to procure the mortgage contemplated by the agreement of the parties.

Upon the complaint seeking specific performance and the petition asking for the injunction, the court ordered the writ to issue.

Defendant appealing first says that the court had no jurisdiction to restrain the defendant from prosecuting his action in forcible entry and detainer, asserting that the matters set forth by plaintiffs can be properly raised as a legal defense in the forcible entry and detainer proceedings. The point is without merit. The court had the equitable right to order specific performance of the contract and also to try the legal right of possession. The right of possession was incidental to the right of specific performance of the contract.

In Gordell v. Solomon, 34 Ill. App. 400, 403, it was said that injunctions will be granted until final decree if it appears that less harm from this course will result to the enjoined party if he should be finally victorious than would accrue to the other party, in the absence of an injunction, if he were the winning party. The primary purpose of such a preliminary injunction

is to prevent a change in the conditions and relations of the persons and property until the respective claims may be investigated and adjudicated. To the same effect are Kulwin v. Harsh, 232 Ill. App. 419; 63rd and Halsted Realty Co. v. Chicago City B. & T. Co., 299 Ill. App. 297, 314; Platt v. Fischer, 285 Ill. App. 110.

Moreover, where a court of equity has acquired jurisdiction to determine the equitable rights of parties in lands it can also determine the legal rights. Roman v. Humphreys, 220 Ill. App. 502; Funk v. Fowler, 179 Ill. App. 356.

Defendant next asserts that the court erred in waiving bond on behalf of the plaintiffs. The requirement of a bond in these cases is largely within the discretion of the chancellor and his order will not be disturbed unless there is a clear abuse of discretion. The order recites that "... it appearing that there is good cause, It Is Further Ordered that no bond need be executed by the plaintiffs." The record justifies the entry of this order and shows that no bond was necessary.

Plaintiffs assert in their complaint and the petition that defendant is preventing them from carrying out their agreement, and they ask for specific performance by defendant. Under such circumstances a preliminary injunction, maintaining the status, should be issued. Young v. Federal Union Surety Co., 13 Ill. App. 278, 281, and Rago v. Village of Melrose Park, 161 Ill. App. 18.

The injunctional order appealed from was properly entered and it is affirmed.

ORDER AFFIRMED.

Whett, J. and O'Connor, J., concur.

is to prevent a change in the conditions and relations of the persons and property until the respective claims may be investigated and adjusted. To the same effect see Kulwin v. Harsh, 253 Ill. App. 418; 253 and Related Realty Co. v. Chicago City B. 253 Ill. App. 287, 314; Platt v. Wischey, 253 Ill. App. 110.

Moreover, where a court of equity has acquired jurisdiction to determine the equitable rights of parties in lands it can also determine the legal rights. Roman v. Humphreys, 250 Ill. App. 602; Runk v. Fowler, 192 Ill. App. 386.

Defendant next asserts that the court acted in violation of its duty on behalf of the plaintiff. The requirement of a bond in these cases is largely within the discretion of the chancellor and his order will not be disturbed unless there is a clear abuse of discretion. The order recites that "... it appearing that there is good cause, it is further ordered that no bond need be executed by the plaintiff." The record justifies the entry of this order and shows that no bond was necessary.

Plaintiff asserts in their complaint and the petition that defendant is preventing them from carrying out their agreement, and they ask for specific performance by defendant. Under such circumstances a preliminary injunction, maintaining the status, should be issued. Young v. Federal Union Society Co., 253 Ill. App. 278, 281, and 253 v. Village of Woodstock Park, 181 Ill. App. 18.

The injunctive order appealed from was properly entered and it is affirmed.

ORDER AFFIRMED.

Robert J. and O'Connor, J., concur.

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Name _____

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1-3-65	Feb 6975	
4/5/63	Feb 6975	
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M. Capra		
V. S. S. S.		
G. Goldman		
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